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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

SANDRA C. PARKER, INDIVIDUALLY, AND AS NEXT FRIEND OF DANA M. PARKER, AND DANA M. PARKER,
Petitioners,

VS.

RODNEY BOYER, DAN DELL, SIMON RISK, AND MULTI-MEDIA KSDK, INC.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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THE QUESTIONS PRESENTED FOR REVIEW

I

Did the Court of Appeals, in conflict with the Second Circuit, correctly determine that Respondent police officers Boyer, Dell and Risk, were entitled to qualified immunity, when they assisted and permitted Respondent Multi-Media KSDK, Inc.'s news crew to enter Petitioner's home while executing a search warrant and to film Petitioners in their home, when the news crew's presence was neither in furtherance nor in aid of the execution of the search warrant by Respondent police officers, but was solely to film Petitioners for its own commercial news broadcast purposes?

II

Did the Court of Appeals correctly determine that Respondent police officers, Boyer, Dell and Risk, were entitled to qualified immunity, without first determining whether they had violated the constitutional rights of Petitioners?

III

Did the Court of Appeals correctly hold that Respondent Multi-Media KSDK, Inc.'s news crew was not acting under color of state law, when it entered Petitioners' home with direct assistance and permission of Respondent Police Officers, although neither in furtherance nor in aid of Respondent Police Officers' execution of a search warrant, but instead to film Petitioners solely for its own commercial news broadcast purposes?

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Sandra C. Parker and Dana M. Parker respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this cause.

CITATIONS OF THE OFFICIAL REPORTS OF OPINIONS

Parker v. Clarke, 905 F.Supp. 638 (E.D.Mo. 1995), *amended* at 910 F.Supp. 460 (E.D.Mo. 1995).

Parker v. Boyer, 93 F.3d 445 (8th Cir. 1996).

STATEMENT OF BASIS FOR THIS COURT'S JURISDICTION

The judgment and order sought to be reviewed is the Opinion of the United States Court of Appeals for the Eighth Circuit entered on August 16, 1996.

An Order denying rehearing by the panel and denying rehearing *en banc* by the United States Court of Appeals for the Eighth Circuit was entered on September 4, 1996.

The statutory authority for this Court's jurisdiction is 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

Amendment IV to the United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or

> Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

STATEMENT OF THE CASE

On the evening of Wednesday, February 9, 1994, Respondent Multi-Media KSDK, Inc.'s ("KSDK") news crew and Respondent police officers Boyer, Dell and Risk ("Police Officers") from the City of St. Louis ("City") Police Department jointly entered and searched Petitioners' ("Parkers") home. At the time of the search, Randall Jackson ("Jackson") was a KSDK street reporter and weekend anchor newsperson. Prior to that date, Jackson had inquired of City's police department about reporting on its gun suppression program. City's Police Officers told him that they would be conducting a search the next week. On the morning of the search, Jackson was invited by City's Police Officers to ride along with them in order to profile the weapons seizure procedure.

Police Officer Sgt. Risk had informed Police Officer Boyer at roll call earlier that evening that the KSDK news crew would be riding that night with him and his partner, Police Officer Dell and that KSDK was interested in City police department's gun suppression efforts. Sgt. Risk knew at the time that Police Officer Boyer had a search warrant in hand. This search warrant did not authorize Police Officers to take a television news crew (or anyone else) with them into or to film anything or anyone within the Parkers' home, while executing the warrant.

City's Police Officers argreed with KSDK's news crew upon a place and time to meet, prior to driving together to the Parkers' home. KSDK's news crew consisted of Jackson and his cameraman Jeff McCollum ("McCollum"). KSDK knew that Jackson and McCollum were accompanying the City's Police Officers in the execution of this search warrant. The news crew left their KSDK's marked vehicle at the prearranged meeting's location and got into City's police car occupied and operated by Police Officers Boyer and Dell. When he picked them up, Boyer told Jackson and McCollum that he would be executing a search warrant. Police Officer Sgt. Risk, a patrol supervisor for the City's Mobile Reserve Unit, also knew that KSDK's news crew would be accompanying the Police Officers during the search.

After leaving the prearranged meeting location, Police Officers Boyer and Dell drove KSDK's news crew Jackson and McCollum directly to the Parker's residence to execute the search warrant. McCollum began filming as soon as he and Jackson exited the police car in front of the Parkers' home.

City's Police Officers entered the Parkers' residence first, and Jackson and McCollum entered directly behind the Police Officers. They did not knock before entering and did not use a key to enter. As they entered, City Police Officers yelled "drug bust," "come out," "stay in here" and "don't move."

Sandra C. Parker and her 15 year old daughter Dana were home at the time that KSDK's news crew and City's Police Officers jointly entered the home. Dana was in the second floor bathroom. She heard people running up the steps and as she reached for the door, a City Police Officer was opening the door. Three or four City Police Officers had guns pointed at her, saying "Get your hands up. Get downstairs." One gun was pointed directly at her head. KSDK's news crew filmed Dana as she went downstairs

with her hands up, in compliance with the City Police Officers' request. The light from the camera was very bright in her face.

KSDK's news crew did not seek permission from Dana to film her. She did not speak with Jackson or McCollum. Her only conversation with a City Police Officer was after she had descended the stairs and was ordered by City's Police Officers to "sit down" and "don't touch nothing. You can't answer the phone."

Sandra C. Parker was sitting in her dining room when KSDK's news crew and City's Police Officers swept into her home. At no time did she give the City police nor KSDK's employees permission to film her or her daughter Dana, or to broadcast publicly their images or film of their home on television. McCollum started filming as a City Police Officer asked Ms. Parker about a gun she had never seen.

KSDK on several occasions publicly aired the film footage on its news broadcasts showing City's Police Officers entering the residence and Dana descending the stairs at gun point, at the direction of City's Police Officers. McCollum also filmed a weapon and what appeared to be drugs, while Boyer held up these items for the camera. No arrests were ever made nor any illegal weapons or drugs discovered as a result of this search.

Neither Jackson nor McCollum, nor any other employee of KSDK sought permission to enter into or to film inside the Parkers' home. Jackson and McCollum entered the foyer, the living room, the basement and one of the upstairs bedrooms. They would not have entered the residence without City Police Officers' cooperation and approval.

After leaving the Parkers' residence, City's Police Officers and Jackson and McCollum jointly entered another residence that same evening, where the residents were also present.

On other occasions, both before and after this search, City's Police Officers have conducted searches in private homes accompanied by news media personnel. Some of these other searches have also occurred inside of private homes. Permitting news media personnel to be present during such searches is consistent with City's police department policy and practice, even when the home's residents have not consented to the broadcast of their images.

It is neither usual nor extraordinary for the news media to ride with City's police officers. According to City police department's Chief, it was "not improper for the police to have, in essence, stood by while the media were present during the conduct of the search warrant" inside a private home.

Original jurisdiction in the United States District Court was based upon 28 U.S.C. §§ 1331 and 1343 and 42 U.S.C. § 1983.

REASONS FOR GRANTING THE WRIT

CONSIDERATIONS FOR THIS COURT'S REVIEW

This Court should review the opinion below because, as herein noted, it directly conflicts with opinions of other Circuit Courts of Appeal and with relevant decisions of this Court.

The growing proliferation of news gathering organizations, as well as the development of greater and more intrusive methods of gathering information, at the expense of individual liberties and privacy, make the questions and issues presented here matters of federal importance and of concern to all citizens.

I. DID THE COURT OF APPEALS, IN CONFLICT WITH THE SECOND CIRCUIT, CORRECTLY DETERMINE THAT RESPONDENT POLICE OFFICERS, BOYER, DELL AND RISK, WERE ENTITLED TO QUALIFIED IMMUNITY, WHEN THEY ASSISTED AND PERMITTED RESPONDENT MULTIMEDIA KSDK, INC.'S NEWS CREW TO ENTER PETITIONERS' HOME WHILE EXECUTING A SEARCH WARRANT AND TO FILM PETITIONERS IN THEIR HOME, WHEN THE NEWS CREW'S PRESENCE WAS NEITHER IN FURTHERANCE NOR IN AID OF THE EXECUTION OF THE SEARCH WARRANT BY RESPONDENT POLICE OFFICERS, BUT WAS SOLELY TO FILM PETITIONERS FOR ITS OWN COMMERCIAL NEWS BROADCAST PURPOSES?

A. The Search of Petitoners Parkers' Home Was Unreasonable Under the Fourth Amendment.

Respondent Police Officers' encouragement, permission and facilitation of Respondent KSDK news crew's intrusion into Petitioners Parkers' home constituted a clear violation of Petitioners Parkers' Fourth Amendment rights.

The Fourth Amendment ensures "[t]he right of the people to be secure in their persons [and] houses . . . against unreasonable searches and seizures."

> The reasonableness requirement of the Fourth Amendment applies not only to prevent searches and seizures that would beu nreasonable if conducted at all, but also to ensure reasonableness in the manner and scope of searches and seizures that are carried out, whethe pursuant to a warrant or under 'exigent circumstances.'

Ayeni v. Mottola, 35 F.3d 680, 684 (2d Cir. 1994), *cert. denied*, —— U.S. ——, 115 S.Ct. 1689 (1995).

Indeed, the fundamental purpose of the Fourth Amendment is to protect the sanctity of the home through pro-

scription of the general warrant. *See: Buonocore v. Harris*, 65 F.3d 347, 353-56 (4th Cir. 1995) (citing *Soldal v. Cook County, Ill.*, 506 U.S. 56 (1992); *Payton v. New York*, 445 U.S. 573, 585 (1980); and *United States v. United States Dist. Ct.*, 407 U.S. 297, 313 (1972)). In discussing the invalidity of the general warrant, the Fourth Circuit concluded that "as early as 1603, it was established in the common law that intrinsic to the validity of the specific warrant was that it had to be executed by a properly commissioned officer to further the *government's purposes.*" *Buonocore*, 65 F.3d at 354.

To endorse Respondent Police Officers' conduct of bringing the news media into Petitioners Parkers' home during the otherwise lawful execution of a search warrant would reverse nearly 400 years of common law protection of private homes. The Framers of our Constitution surely did not intend for the police to use search warrants as free admission passes into private homes for both themselves and anyone they might choose to invite as their welcomed guests for their or their guests' entertainment.

The Second Circuit has addressed an identical fact scenario—and has found violation of the Constitution. In *Ayeni*, federal Secret Service Agents executed a search warrant in plaintiffs' home, based upon information that an individual who resided in the apartment was committing credit card fraud. *Id.* at 683. Only the wife and the minor child of the target individual were home during the search, and neither of those two persons was a suspect. *Ibid.* Approximately two hours after the search began, additional Secret Service Agents entered the apartment with the search warrant and the members of a CBS television crew. *Ibid.* The search warrant did not authorize the presence of CBS and the news crew did not assist in the search. *Id.* at 686. Without plaintiffs' consent, CBS videotaped them and the police officers' search of their home. However, in *Ayeni* CBS did not broadcast any of the footage that it had filmed. *Id.* at 684.

The Second Circuit held that the plaintiffs had alleged a clear violation of their Fourth Amendment rights and that defendant Secret Service agents' claim of qualified immunity was without merit.

> It has long been established that the objectives of the Fourth Amendment are to preserve the right of privacy to the maximum extent consistent with reasonable exercise of law enforcement duties and that, in the normal situations where warrants are required, law enforcement officers' invasion of the privacy of a home must be grounded on either the express terms of a warrant or the implied authority to take reasonable law enforcement actions related to the execution of the warrant . . . [The Secet Service agent] exceeded well-established principles when he brought into the Ayeni home persons who were neither authorized by the warrant to be there nor serving any legitimate law enforcement purpose by being there.

Id. at 686. The Appellate Court aptly noted that "[a] private home is not a soundstage for law enforcement theatricals." *Ibid.*

The *Ayeni* court also found statutory reinforcement for its conclusion that the Secret Service agents had violated the Fourth Amendment. 18 U.S.C. § 3105 provides that:

> A search warrant may in all cases be served by any of the officers mentioned in its direction or by an officer authorized by law to serve such warrant, but by no other person, except in aid of the officer on his requiring it, he being present and acting in its execution.

"Though the statute [§ 3105] is not determinative of the scope of the Fourth Amendment, it provides some basis for giving content to the Amendment's generalized standard of reasonableness." *Id.* at 687. Thus, the *Ayeni* court concluded, the agents conducted an unreasonable search because they brought unauthorized individuals into the Ayeni's home.

Respondent Police Officers brought Respondent KSDK's news crew into Petitioners Parkers' home, knowing the crew would be filming for broadcasting purposes and despite the fact that the search warrant did not authorize the news crew's presence. Respondent Police Officers drove Respondent KSDK's news crew to Petitioners Parkers' residence and facilitated their entry into the home, without the consent of its residents.

No federal appellate court has held contrary to the Second Circuit's holding in *Ayeni*. The Fourth Circuit recently endorsed the rationale of *Ayeni* in *Buonocore*, 65 F.3d at 356 n. 7. In *Buonocore*, a homeowner sued officials, as well as private parties, under § 1983 for violation of his Fourth and Fourteenth Amendments rights. Officials had invited a telephone company employee to enter the plaintiff's residence during the execution of a search warrant to help identify stolen telephone company equipment. *Id.* at 350. The search warrant neither authorized the private party's presence nor mentioned the telephone company equipment. *Ibid.* The Fourth Circuit held plaintiff had alleged a violation of his Fourth Amendment rights. "To conclude otherwise would authorize law enforcement officers to invite private individuals to engage in conduct that would constitute trespass were it not conducted under the guise of a search warrant." *Id.* at 359. Similarly, the search warrant in this case neither authorized Respondent KSDK's film crew to be present in Petitioners Parkers' home nor to search nor to seize visual images of individuals not targets of the search.

Bills v. Aseltine, 52 F.3d 596 (6th Cir. 1995), *cert. denied*, —— U.S. ——, 116 S.Ct. 179 (1995) (*Bills II*) also supports Petitioners Parkers' position. In *Bills II*, the Sixth Circuit considered the issue of whether a police officer was entitled to qualified immunity under § 1983, after inviting an unauthorized General Motors security officer into a private home during the execution of search warrants. The Sixth Circuit stated that "the presence of pri-

vate citizens at a search" may be lawful "when they are assisting the police" (citing 18 U.S.C. § 3105). *Id.* at 603. Here, Respondent KSDK's news crew did nothing to assist Respondent Police Officers in executing the search warrant.

B. Respondent Police Officers Are Not Entitled to Qualified Immunity, Having Violated a Clearly Established Constitutional Right.

Government officials performing discretionary functions are not entitled to qualified immunity, if their conduct "violate[s] clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). *See* also *Anderson v. Creighton,* 483 U.S. 635, 638-39 (1987).

Harlow focuses on the objective legal reasonableness of the public official's act. *Buonocore* confirms that precise factual precedent need not exist for there to be a clearly established right. The phrase "clearly established":

> 'includes not only specifically adjudicated rights but those manifestly included within more general applications of the core constitutional principle invoked.' [quoting *Anderson,* 483 U.S. at 640.] The right to be free from government officials facilitating a private person's general search of the sort Buonocore alleges was conducted here, is 'manifestly included' within 'core' Fourth Amendment protection . . . 'the absence of [many] reported case[s] with similar facts demonstrates nothing more than wide-spread compliance with well-recognized constitutional principles.' *Eberhardt v. O'Malley,* 17 F.3d 1023, 1028 (7th Cir. 1994).

Buonocore, 65 F.3d at 357.

Indeed, "qualified immunity may not be available even though the very act in question has not specifically been held unlawful." *Jones v. Coonce,* 7 F.3d 1359, 1362 (8th Cir. 1993). "It would be, arguably, grossly unreasonable

for a government agent not to have known that the presence of private persons he invited in so that they could titillate and entertain others was beyond the scope of what was lawfully authorized by the warrant." *Ayeni v. CBS Inc.*, 848 F. Supp. 362, 368 (E.D.N.Y. 1994). The District Court in *Ayeni* concluded that, "[t]he action of . . . [the government agent] was so far from then well established acceptable constitutional behavior that no case law precedent was needed to alert him to the fact that the execution of a warrant for the benefit of private persons violated the Constitution." *Id.* at 368.

The fact that the appellate decision in *Ayeni* was after the incident in this case is not significant. The Second Circuit in *Ayeni* merely reiterated the clear constitutional principles involved, it did not establish them. Petitioners Parkers' Fourth Amendment rights existed in unequivocal and recognized fashion long before the Second Circuit's decision in *Ayeni*.

II. DID THE COURT OF APPEALS CORRECTLY DETERMINE THAT RESPONDENT POLICE OFFICERS, BOYER, DELL AND RISK, WERE ENTITLED TO QUALIFIED IMMUNITY WITHOUT FIRST DETERMINING THEY HAD VIOLATED THE CONSTITUTIONAL RIGHTS OF PETITIONERS?

The Eighth Circuit's fractured opinion failed to address the unconstitutionality of Respondent Police Officers' actions, before it prematurely decided the issue of qualified immunity. In District Judge Rosenbaum's special concurrence, he notes both this Court's rulings and recent Eighth Circuit rulings requiring this two step process. *See: Seigert v. Gilley*, 500 U.S. 226, 231-32 (1991); *Manzano v. South Dakota Dept. of Social Servs.*, 60 F.3d 505, 509 (8th Cir. 1995); and *Boyd v. Knox*, 47 F.3d 966, 968 (8th Cir. 1995). *See*, also: *Pro v. Donatucci*, 81 F.3d

1283, 1287 (3rd Cir. 1996); *Kelly v. Foti*, 77 F.3d 819, 821 (5th Cir. 1996); *Taylor v. Meacham*, 82 F.3d 1556, 1559 (10th Cir. 1996); and *McMillian v. Johnson*, 88 F.3d 1554, 1564 (11th Cir. 1996).

The failure of Circuit Judge Morris Sheppard Arnold's lead opinion to first consider whether a constitutional violation had occurred is compounded by the opinion by Chief Circuit Judge Richard S. Arnold, concurring in part and dissenting in part, which held that Respondent KSDK were state actors for purposes of 42 U.S.C. § 1983, without any finding of a constitutional violation by either Respondent Police Officers or by Respondent KSDK or a finding as to whether qualified immunity was available to Respondent KSDK.

III. DID THE COURT OF APPEALS CORRECTLY HOLD THAT RESPONDENT MULTI-MEDIA KSDK, INC.'S NEWS CREW WAS NOT ACTING UNDER COLOR OF STATE LAW, WHEN IT ENTERED PETITIONERS' HOME WITH THE DIRECT ASSISTANCE AND PERMISSION OF RESPONDENT POLICE OFFICERS, ALTHOUGH NEITHER IN FURTHERANCE NOR IN AID OF RESPONDENT POLICE OFFICERS' EXECUTION OF A SEARCH WARRANT, BUT INTSTEAD TO FILM PETITIONERS SOLELY FOR ITS OWN COMMERCIAL NEWS BROADCAST PURPOSES?

Under 42 U.S.C. § 1983, Congress expressly furnished a remedy for violations of federal constitutional rights, when the violator acts under color of state law as a governmental official or under the mantle of state authority. When the offender is a private (non-governmental) party, the plaintiff must establish that the defendant engaged or participated in governmental action at the time of the violation and injury.

A. *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922 (1982).

In Lugar, this Court created a two part test to assist in determining the existence of state action.

> First, the [unconstitutional] deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor.

Id. at 937. In *Lugar*, plaintiff brought suit under § 1983 against defendant corporation which had attached plaintiff's property pursuant to a state prejudgment attachment statute. *Id.* at 924-25. Plaintiff alleged that by attaching his property, defendant corporation had acted "jointly" with the County Sheriff and the County Clerk to violate his Fourteenth Amendment due process rights. Plaintiff Lugar did not name the County officials in his suit. *Ibid.* This Court held that plaintiff had stated a valid § 1983 claim, despite the fact that he had not named the County officials in his suit and that the corporate defendant had relied in good faith upon a presumably valid state law.

B. *Lugar's* First Prong.

The right created by the State here was the privilege of Respondent Police Officers to enter and to search the Petitioners Parkers' residence pursuant to a valid search warrant. Respondent KSDK's news crew could not and would not have entered the Petitioners Parkers' home, except in conjunction with Respondent Police Officer's lawful entry pursuant to the search warrant. The Eighth Circuit's holding below serves to condone a private party acting in concert with governmental officials to violate a person's federal constitutional rights with impunity, as long as each party defendant pursues a different end goal

in the violation of plaintiff's rights. Congress certainly did not intend this result.

> ' "Private persons, jointly engaged with state officials in the prohibited action, are acting 'under color' of law . . . [which] does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents." '

Lugar, 457 U.S. at 941.

C. *Lugar*'s Second Prong.

For state action to exist, "the party charged with the deprivation must be a person who may fairly be said to be a state actor because . . . he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State." *Lugar*, 457 U.S. at 937. Respondent KSDK qualifies as a state actor under both the second and third clauses of the state action prong. Clearly, Respondent KSDK's news crew received significant assistance from Respondent Police Officers in the resulting violation of the Parkers' civil rights. Consequently, KSDK's conduct satisfies this second prong and qualifies, as well, as conduct "otherwise chargeable to the state" under the third "catch-all" phrase. In *Lugar*, the state's involvement was totally passive (*i.e.*, the passage of legislation), while here Respondent Police Officers' involvement consisted of active and substantial assistance.

D. Theories of State Action.

This Court has fashioned several theories under which an aggrieved party may establish the existence of state action: the symbiotic relationship test; the public function test; the nexus or state compulsion test; and the joint participation test. Liability as a state actor clearly attaches to KSDK under the joint participation test, the symbiotic relationship test and the nexus test.

(1) *Joint Participation Test.*

> 'Private persons, jointly engaged with state officials in the prohibited action, are acting "under color" of law for purposes of the statute. To act "under color" of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents . . .'

Adickes v. S. H. Kress and Co., 398 U.S. 144, 152 (1970) (quoting *United States v. Price*, 383 U.S. 787, 794 (1966)).

Unquestionably, Respondent KSDK's news crew jointly participated with Respondent Police Officers in violating Petitioners Parkers' constitutional rights. The meeting between Respondent KSDK's news crew and Respondent Police Officers was prearranged, and Respondent KSDK's news crew rode in the police car and were driven by Respondent Police Officers to the Parkers' home. Respondent KSDK's news crew entered Petitioners Parkers' home not only on the heels of Respondent Police Officers, but with their knowledge, expectation and approval, as well. Respondent KSDK's news crew would never have been inside Petitioners Parkers' home, but for Respondent Police Officers' execution of the search warrant that evening. Respondent KSDK's news crew entered with Respondent Police Officers, remained in the home during the entire search, and left with Respondent Police Officers. Respondent KSDK's news crew then went with Respondent Police Officers directly to another home to film a similar warrant being executed. It is difficult to imagine a scenario in which Respondent Police Officers might have acted more closely in concert with Respondent KSDK's news crew, short of Respondent Police Officers holding Respondent KSDK's cameras for them.

Respondent KSDK's news crew was no more privileged to be granted access to Petitioners Parkers' home than family or friends of Respondent Police Officers, had the latter elected to invite them to watch the search warrant

being executed. "The First Amendment generally grants the press no right to information . . . superior to that of the general public." *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 609 (1978). *See: Pell v. Procunier*, 417 U.S. 817, 834 (1974); *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972); and *Zemel v. Rusk*, 381 U.S. 1, 16-17 (1965).

This Court in *Lugar* did not require that a private party's actions rise to the level of a conspiracy to constitute state action. State action may be established merely when the private party "has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State." *Lugar*, 457 U.S. at 937. Indeed, the plaintiff in *Lugar* did not allege any conspiracy or even collusion between the County officials and defendant corporation.

Public benefits arise from encouraging police officers to comply with the clear mandates of the Fourth Amendment when conducting otherwise lawful searches in private homes. Indeed, Justice White speaking for the majority in *Lugar* noted that a finding of state action should be limited to situations where "the conduct allegedly causing the deprivation of a federal right . . . [is] *fairly attributable* to the State." *Lugar*, 457 U.S. at 937 (emphasis added). Here, Respondent Police Officers permitted and facilitated Respondent KSDK news crew's entry into Petitioners Parkers' home. Respondent Police Officers' restraint of all of the home's occupants at gun point and the herding of them into one room, greatly facilitated Respondent KSDK news crew roaming freely throughout the house, seizing and capturing the occupants' visual images and footage of their home, at will. This conduct is precisely the sort that the drafters of the Civil Rights Act in 1871 sought to prohibit.

Indeed, it has been suggested that state action may be established merely where the private party "derives some 'aid, comfort, or incentive,' either real or apparent, from

the state." *Lucas v. Wisconsoin Electric Power Co.*, 466 F.2d 638, 655 (7th Cir. *en banc* 1972), *cert. denied*, 409 U.S. 1114 (1973) (citing *Adickes*, 398 U.S. at 212 (Brennan, J. concurring)).

Furthermore, state action by a private party may be established by circumstantial evidence; proof of the existence of an explicit agreement is not required. Writing for the majority in *Adickes*, Justice Harlan noted that the jury might "infer from the circumstances that the policeman and a Kress employee had a 'meeting of the minds' and thus reached an understanding that petitioner should be refused service." *Id.*, 398 U.S. at 158. As so aptly noted in *Lucas*, to act under color of law means only the " 'appearance, semblance, or *simulacrum*, but not necessarily the reality.' " *Id.*, 466 F.2d at 655 n.38.

Accordingly, here Respondents KSDK and Police Officers jointly agreed for Respondent KSDK's news crew to be present and to enter Petitioners Parkers' home under the guise of the search warrant. There need not be an agreement to violate Petitioners Parkers' Fourth Amendment rights or a sharing of a common motive or purpose to constitute a Fourth Amendment violation.

(2) *Symbiotic Relationship and Nexus Tests.*

This Court enunciated the symbiotic relationship test in *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725 (1961) and found it to exist where the "State has so far insinuated itself into a position of interdependence . . . that it must be recognized as a joint participant in the scope of the challenged activity, which on that account, cannot be considered . . . without the scope of the Fourteenth Amendment." In *Burton*, plaintiff sued a municipal parking authority and a restaurant for violation of civil rights. The restaurant leased space from the state parking authority. This Court found that the restaurant was a state actor because both parties received an ongoing benefit from the lease agreement. Similarly, Respondents

KSDK and Police Officers mutually benefitted from Respondent KSDK news crew's entrance into Petitioners Parkers' home. Respondent Police Officers enabled Respondent KSDK to produce a story for their commercial news broadcasting publicizing Respondent Police Officers' gun suppression efforts. The facts in the instant case also support a clear "nexus" between the acts of Respondent Police Officers and the acts of Respondent KSDK's news crew.

This Court has not established any single test that can be applied to determine when state action has occurred. Instead, this Court has noted that "[o]nly by sifting facts and weighing circumstances" can the courts determine if a private party has engaged in state action. *Burton*, 365 U.S. at 722. As in *Burton*, Respondent Police Officers attempted to cloak Respondent KSDK's news crew with the former's authority and to grant them access to Petitioners Parkers' home under the aegis of Respondent Police Officers' warrant.

> '[W]hen authority derives in part from the Government's thumb on the scales, the exercise of that power by private persons becomes closely akin, in some respects, to its exercise by Government itself.'

Reuber v. United States, 750 F.2d 1039, 1057 (D.C. Cir. 1984) (quoting with approval *Public Utilities Commission v. Pollak*, 343 U.S. 451, 462 n.8 (1952).

CONCLUSION

For the foregoing law, equities and reasons, Petitioners Sandra C. Parker and Dana M. Parker respectfully petition this Court for a writ of certiorari to review the judgment below of the United States Court of Appeals for the Eighth Circuit in this cause.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-3988
No. 95-4075

SANDRA PARKER, Individually, and as next friend of Dana M. Parker, and DANA M. PARKER,
Appellees,

v.

RODNEY BOYER, DAN DELL, and SIMON RISK,
Appellants.

SANDRA PARKER, Individually, and as next friend of Dana M. Parker, and DANA M. PARKER,
Appellants,

v.

MULTI-MEDIA KSDK, INC.,
Appellee.

Appeals from the United States District Court
for the Eastern District of Missouri

Submitted: June 10, 1996

Filed: August 16, 1996

Before RICHARD S. ARNOLD, Chief Judge, MORRIS SHEPPARD ARNOLD, Circuit Judge, and ROSENBAUM,* District Judge.

MORRIS SHEPPARD ARNOLD, Circuit Judge.

Sandra and Dana Parker made claims under 42 U.S.C. § 1983 and under state law against police officers who conducted a search of their home. They made similar claims against a television station whose reporting crew entered the house after the police did. The district court granted summary judgment for the Parkers against three police officers on their fourth-amendment claims and granted summary judgment in favor of the television station. In light of the disposition of the federal claims the district court declined jurisdiction over the supplemental state-law claims. *See Parker v. Clarke*, 905 F. Supp. 638 (E.D. Mo. 1995). The three police officers and the television station appealed to this court. We reverse, on grounds of qualified immunity, the district court's finding of liability against the officers. We affirm the district court's judgment in favor of the television station because the reporting crew was not acting under color of state law when it entered the Parkers' house.

I.

We will summarize the district court's findings of fact, with which the parties seem to have no dispute. A reporter from KSDK, a television station in St. Louis, contacted the St. Louis Police and told them that he was interested in developing a television news story about the police department's efforts to eradicate illegal weapons. Sometime later, the police told the reporter that a weapons investigation was in progress that he might be inter-

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* THE HONORABLE JAMES M. ROSENBAUM, United States District Judge for the District of Minnesota, sitting by designation.

ested in covering. The investigation centered on the activities of one Travis Martin, a man who resided in a house in which Sandra and Dana Parker also lived. Sgt. Simon Risk later informed officer Rodney Boyer that KSDK personnel would accompany him on his shift that night, and KSDK personnel rode to the scene in a police car with Officer Boyer and Officer Dan Dell. After detaining Mr. Martin outside, Sgt. Risk and six other officers, including Boyer and Dell, executed the search warrant at the Parkers' residence. They entered through an unlocked front door, and the KSDK personnel followed the police into the house. Although the police discovered two weapons and several substances believed to be cocaine, no charges were filed against Mr. Martin or anyone else as a result of the search. KSDK broadcast the tapes that it made at the Parkers' residence on several news programs.

As the district court noted, the police did not give the KSDK personnel any instructions or directions before the search, nor did the police impose any limitations on their conduct. Neither the police nor KSDK personnel sought or obtained the Parkers' permission to videotape the search or broadcast the resulting videotape. The district court also noted that the chief of police testified that his department's policy was to require the media to obtain permission to videotape private citizens whose houses were being searched. If such permission had not been obtained, he testified, the supervising officer on the scene was not supposed to allow the media to enter a private residence, because, the chief believed, such an entry would constitute a trespass.

II.

We deal first with the Parkers' claims against the police officers.

Government officials are entitled to qualified immunity from suit for civil damages if their conduct does not violate clearly established federal rights of which a reason-

able person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Jones v. Coonce*, 7 F.3d 1359, 1362 (8th Cir. 1993). The issue here is whether reasonable police officers would have known that permitting a television crew to enter a house during the execution of a search warrant would violate a clearly established fourth-amendment right. Though we have no case on point, and the Supreme Court has not provided specific guidance on the question, most courts have rejected the argument that the United States Constitution forbids the media to encroach on a person's property while the police search it. *Avenson v. Zegart*, 577 F. Supp. 958 (D. Minn. 1984); *Moncrief v. Hanton*, 10 Med. L. Rptr. 1620 (N.D. Ohio Jan. 6, 1984); *Higbee v. Times-Advocate*, 5 Med. L. Rptr. 2372 (S.D. Cal. Jan. 9, 1980); *Prahl v. Brosamle*, 98 Wis.2d 130, 295 N.W.2d 768 (Wis. Ct. App. 1980). On the other hand, a recent case held that clearly established constitutional law forbids the police to permit the media to enter a home during a search. *Ayeni v. CBS, Inc.*, 848 F. Supp. 362 (E.D.N.Y. 1994), *aff'd, Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 1689 (1995); *see also Buonocore v. Harris*, 65 F.3d 347 (4th Cir. 1995) (clearly established constitutional law prohibited police from bringing a telephone company employee into a home to conduct an independent general search for items not identified in any warrant).

In assessing claims of qualified immunity, we are of course required to examine the state of the relevant law at the time the officials committed the acts of which the plaintiffs complain. *Harlow*, 457 U.S. at 818-19; *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). Because both *Ayeni* and *Buonocore* were decided after the police in this case executed their search, those cases cannot weigh in the balance against a finding of qualified immunity. Even if we believed that those two cases were entitled to consideration, they would appear to us to indicate at most only the beginnings of a trend in the law. Nor do we think it self-evident that the police offend general fourth-amend-

ment principles when they allow members of the news media to enter someone's house during the execution of a search warrant. Accordingly, we cannot say that the kind of conduct in which police engaged in this case was a violation of a clearly established constitutional principle of which the police, at the time they executed their search warrant, should have been aware. The district court therefore erred in concluding that the police officers did not enjoy qualified immunity.

III.

We turn now to the Parkers' claims against KSDK.

"The traditional definition of acting under color of state law requires that the defendant in a § 1983 action have exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.' " *West v. Atkins*, 487 U.S. 42, 49 (1988) (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)); *Gentry v. City of Lee's Summit*, 10 F.3d 1340, 1342 (8th Cir. 1993). The requirement of state action in suits for alleged deprivation of civil rights "preserves an area of individual freedom by limiting the reach of federal law and federal judicial power." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982). The injury complained of must have been caused by the exercise of some right or privilege created by the state, by a rule of conduct imposed by the state, or by a person for whom the state is responsible. *Id.* at 937. The Parkers appear to argue only that KSDK exercised a right or privilege created by the state when they entered the house.

It is undisputed that KSDK acted independently of the police in deciding to enter the house and videotape the events there and that neither KSDK nor the police assisted the other in the performance of their separate and respective tasks. The KSDK personnel did not execute the search warrant and they entered the house after the police did. Th television station was there for reasons of its own and

was engaged in a mission entirely distinct from the one that brought the police to the house. Seizing an opportunity to trespass is not the same as invoking a right or privilege. We agree with the district court that "[a]t most, KSDK's acts were committed parallel to and contemporaneous with the police officers' exercise of privileges under state law in the execution of a lawfully obtained search warrant," 905 F. Supp. at 642, and that KSDK was not exercising a right or privilege created by the state when it decided to enter the Parkers' home to record the events taking place there. KSDK's entry into the Parkers' house and videotaping the events that occurred there was therefore not an act committed under color of state law. *See Lugar*, 457 U.S. at 936.

IV.

For the foregoing reasons, we affirm the judgment of the district court in part, reverse it in part.

ROSENBAUM, District Judge, concurring specially.

I join the Court's opinion, but write separately to address the constitutional question underlying the issue of qualified immunity. In my view, our jurisprudence demands a first determination of whether the claimed constitutional right, in fact, exists. We have missed this required first step in the qualified immunity analysis.

This court has consistently ruled that, "[i]n order to determine whether a defendant is entitled to qualified immunity, we engage in a two-part analysis." *Manzano v. South Dakota Dep't of Social Servs.*, 60 F.3d 505, 509 (8th Cir. 1985) (citing *Boyd v. Knox*, 47 F.3d 966, 968 (8th Cir. 1985)); *see also Siegert v. Gilley*, 500 U.S. 226, 231-32 (1991). "First, we must determine whether the plaintiff has alleged the violation of a constitutional right." *Manzano*, 60 F.3d at 509. In my view, we have neglected this determination. It is not until we have made this required decision that we analyze whether such right

was clearly established at the time of its alleged violation. *Manzano*, 60 F.3d at 509.

I would find, consistent with *Ayeni v. Mottola*, 35 F.3d 680, 686 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 1689 (1995), that police officials executing a search warrant violate a resident's Fourth Amendment rights, when they admit representatives of the public media into a private citizen's home, without first securing the resident's express consent.

Having recognized this right, I would join the court and determine these officers did not violate a constitutional right which was clearly established at the time they allowed the television news crew to enter the Parkers' home.

RICHARD S. ARNOLD, Chief Judge, concurring in part and dissenting in part.

I join all but part III of the Court's opinion. With respect to the issue decided in that portion of the opinion, having to do with whether KSDK's employees were state actors for purposes of 42 U.S.C. § 1983, I respectfully dissent. In my view, the news crew acted in concert with the police in entering the Parkers' home. They were " 'willful participants[s] in joint activity with the State or its agents . . . .' " *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970), quoting *United States v. Price*, 383 U.S. 787, 794 (1966). The news crew came to the location with the police and could not have entered if the police had not done so first. They did not simply happen along the street at the time that a search was being conducted.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

[Filed Sep. 19, 1996]

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-3988EMSL/95-4075EMSL

SANDRA PARKER, Individually, and as next friend of Dana M. Parker, and DANA M. PARKER,
Appellees,

vs.

RODNEY BOYER, DAN DELL, and SIMON RISK,
Appellants,

SANDRA PARKER, Individually, and as next friend of Dana M. Parker, and DANA M. PARKER,
Appellants,

v.

MULTI-MEDIA KSDK, INC.,
Appellee.

Appeal from the United States District Court
for the Eastern District of Missouri

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is merely ordered and adjudged that the judgment of the district court in this cause is

affirmed in part and reversed in part in accordance with the opinion of this Court.

August 16, 1996

A true copy.

ATTEST:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

[Mandate issued Sep. 18, 1996]

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-3988/4075EMSL

SANDRA PARKER, *et al.*,
Appellees,

vs.

RODNEY BOYER, *et al.*,
Appellants.

Order Denying Petition for Rehearing and
Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

September 4, 1996

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk
U.S. Court of Appeals
Eighth Circuit

[Filed Nov. 6, 1995]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 4:94CV1693-DJS

SANDRA C. PARKER, Individually and as next friend of Dana M. Parker, and DANA M. PARKER,
Plaintiffs,

vs.

ANNE-MARIE CLARKE, CHARLES E. MISCHEAUX, MATTHEW J. PADBERG, ROBERT T. HAAR, RODNEY BOYER, DAN DELL, JOSEPH RICHARDSON, SIMON RISK, TERRENCE SLOAN and MULTI-MEDIA KSDK, INC.,
Defendants.

ORDER

On October 31, 1995, the Court entered an order and partial summary judgment in which the Court determined as a matter of law that defendants Boyer, Dell and Risk were liable to plaintiffs on their Fourth Amendment claims under 42 U.S.C. § 1983, and that all defendants were entitled to judgment as a matter of law as to all of plaintiffs' remaining claims under § 1983. Defendants Boyer, Dell and Risk have now filed a motion "for certification of judgment as final for purposes of appeal, for clarification of the Court's order and for a stay of proceedings."

In *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985), the Supreme Court held that "a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the ab-

sence of a final judgment."[1] To the extent defendants seek clarification of the Court's October 31 order, the Court now makes explicit what was clear but implicit in the Court's rationale and rulings: the Court deliberately but impliedly rejected the qualified immunity defense asserted by defendants Boyer, Dell and Risk when it denied in part their motion for summary judgment and granted in part plaintiffs' motion for summary judgment.

The instant motion expresses Boyer, Dell and Risk's intention to immediately appeal the denial of qualified immunity. Although such an appeal has commonly been referred to as an "interlocutory" appeal, the Supreme Court's holding in *Mitchell* refers to § 1291, which provides or appeals of final decisions, rather than to § 1292, which governs appeals from interlocutory decisions. As such, the appeal concerning qualified immunity does not require the district court's certification, as does a true interlocutory appeal pursuant to § 1292(b). *See, e.g., Swint v. Chambers County Commission,* 115 S.Ct. 1203, 1209-10 (1995) [contrasting appeal as of right under § 1291 with permissive interlocutory appeal under § 1292(b)]. Although the qualified immunity claim is not waived by defendants' failure to take an immediate appeal, *see Littlewind v. Rayl,* 33 F.3d 985, 986 (8th Cir. 1994) and *McIntosh v. Weinberger,* 810 F.2d 1411, 1431 n.7 (8th Cir. 1987), the appeal of this issue is now available as a matter of right.

Boyer, Dell and Risk also ask the Court to certify as final for purposes of appeal, pursuant to Fed.R.Civ.P. 54(b), the grant of partial summary judgment against them on the Fourth Amendment claims asserted in Counts

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[1] The Court's qualified immunity determination in this case is entirely an issue of law, and not based on a determination concerning the existence of disputed facts for trial, the latter of which would not be immediately appealable under the Supreme Court's recent ruling in *Johnson v. Jones,* 115 S.Ct. 2151, 2159 (1995).

I and V. Summary judgment as to liability only, without a determination of damages, does not allow entry of final judgment on the underlying claims; Rule 54(b) therefore cannot be applied to allow appeal of this determination. *See Liberty Mutual Ins. Co. v. Wetzel*, 424 U.S. 737, 744 (1976); *Pemberton v. State Farm Mutual Auto. Ins.*, 996 F.2d 789, 791 (5th Cir. 1993). Instead:

> [A] judgment for the plaintiff that determines liability for, but does not fix the amount of, damages is appealable solely under 28 U.S.C. § 1292(b), which requires not only appropriate certification by the district court but also application within ten days to the Court of Appeals and that court's grant, in its discretion, of permission to appeal.

Pemberton, 996 F.2d at 791.

The Court will construe the motion as seeking certification for interlocutory appeal of the adverse summary judgment determination under § 1292(b). The Court finds, pursuant to § 1292(b), that its summary judgment determination against defendants Boyer, Dell and Risk involves a controlling question of law as to which there is substantial ground for difference of opinion, and that an immediate appeal of this determination may materially advance the ultimate termination of the litigation. On the facts of this case, the substantive Fourth Amendment issue presented is a question of first impression in the Eighth Circuit, satisfying the substantive predicate of the § 1292(b) standard. As for the procedural predicate, in view of the appeal as of right on the qualified immunity issue available to defendants Boyer, Dell and Risk, and the other dispositive determinations dealt with below pursuant to Rule 54(b), this § 1292(b) certification advances the ultimate disposition of the litigation by allowing a unitary appeal of the Court's substantive determinations as to liability. In view of the global nature of the appeals to be taken, the Court will also order pursuant to § 1292(b)

that all district court proceedings be stayed during the pendency of the appeals.

Also before the Court is plaintiffs' motion pursuant to Rule 54(b) for certification of the Court's ruling in favor of defendant Mutli-Media KSDK, Inc. on Counts III and VII of the second amended complaint. The Court's entry of judgment as a matter of law in favor of KSDK on plaintiffs' § 1983 claims is a final determination of the rights and liabilities of both plaintiffs and KSDK on these claims. This determination is, therefore, suitable for application of Rule 54(b), pursuant to which the Court here expressly determines that there exists no just reason for delay as to any appeal. The Court has already entered final judgment on these claims, in the third paragraph of its partial summary judgment of October 31, 1995, but to the extent necessary to satisfy Rule 54(b), here directs that this judgment be construed as final for purposes of appeal.

The Court's October 31 order and partial judgment also finally determined, in favor of defendants, plaintiffs' § 1983 claims against the members of the Police Board and against Lt. Richardson and Sgt. Sloan, and as against defendants Boyer, Dell and Risk on all theories other than the Fourth Amendment. As alluded to above, the Court will take steps to render these determinations final and appealable pursuant to Rule 54(b) as well, so as to allow all of the Court's liability determinations to be appealed at one time. The Court finds that there is no just reason for delay in treating these determinations as final and appealable, and hereby directs that the October 31 entry of summary judgment in defendants' favor, found in the second paragraph of the partial summary judgment, be deemed the entry of final judgment as to these claims.

Finally, on page 3 of its October 31 order, in its recitation of facts undisputed for purposes of the motions for summary judgment, the Court stated that "[t]wo weapons and several quantities of cocaine, in both rock and powder

forms" were seized by the policed uring the search at issue in this case. The Court notes that page one of the narrative police report refers to the seizure of "two white baggies consisting of a white powdery substance believed by [defendant Boyer] to be powdered cocaine" and "two small baggies containing numerous off-white chunks of a substance believed to be 'crack' cocaine." Pursuant to Fed.R.Civ.P. 60(a), the Court will amend the language of page 3 of the order to read: "[t]wo weapons and several substances believed to be cocaine, in both rock and powder forms. . . ."

Accordingly,

IT IS HEREBY ORDERED that the motion of defendants Boyer, Dell and Risk for certification of judgment as final for purposes of appeal is construed as a motion for certification pursuant to 28 U.S.C. § 1292(b) and is granted.

IT IS FURTHER ORDERED that the motion of defendants Boyer, Dell and Risk for clarification of the Court's order of October 31, 1995 is granted, and the Court here makes explicit that its partial denial of their motion for summary judgment was premised on its rejection of their qualified immunity defense.

IT IS FURTHER ORDERED, pursuant to 28 U.S.C. § 1292(b), that the October 31, 1995 entry of partial summary judgment in favor of plaintiffs and against defendants Boyer, Dell and Risk on Counts I and V is certified for interlocutory appeal, based on the Court's finding that this determination involves controlling questions of law as to which there is substantial ground for difference of opinion, and that an immediate appeal of this determination may materially advance the ultimate termination of the litigation.

IT IS FURTHER ORDERED that plaintiffs' motion for an express determination of final judgment pursuant to Fed.R.Civ.P. 54(b) is granted.

IT IS FURTHER ORDERED, pursuant to Fed.R.Civ. P. 54(b), that the October 31, 1995 entry of summary judgment in favor of defendants Clarke, Mischeaux, Padberg, Haar, Boyer, Dell, Richardson, Risk and Sloan as to the remainder of Counts I and V, and in favor of defendant Multi-Media KSDK, Inc. on Counts III and VII, are final and appealable, based on the Court's determination that there is no just reason for delay and that these portions of the October 31, 1995 partial summary judgment be entered as final judgment on these claims.

IT IS FURTHER ORDERED, pursuant to 28 U.S.C. § 1292(b), that all proceedings in this Court shall be stayed pending the appeals taken pursuant to this order.

IT IS FURTHER ORDERED that the November 6, 1995 trial setting is vacated, and any motions which remain pending are denied without prejudice to be refiled following the lifting of the stay pending appeal.

IT IS FURTHER ORDERED, pursuant to Fed.R.Civ. P. 60(a), thato n page 3 of the Court's October 31, 1995 order, the fourth sentence of the second paragraph is amended nunc pro tunc to read: "Two weapons and several substances believed to be cocaine, in both rock and powder forms, were seized during the search."

/s/ [Illegible]
United States District Judge

Dated: 11/6/95

[Filed Oct. 31, 1995]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 4:94CV1693-DJS

S(NDRA C. PARKER, Individually and as next friend of Dana M. Parker, and DANA M. PARKER,
Plaintiffs,

vs.

ANNE-MARIE CLARKE, CHARLES E. MISCHEAUX, MATTHEW J. PADBERG, ROBERT T. HAAR, RODNEY BOYER, DAN DELL, JOSEPH RICHARDSON, SIMON RISK, TERRENCE SLOAN and MULTI-MEDIA KSDK, INC.,
Defendants.

ORDER

Plaintiffs, a mother and her 16-year-old daughter, bring the instant action pursuant to 42 U.S.C. § 1983 and Missouri tort law alleging that defendants—four members of the Board of Police Commissioners of the City of St. Louis, five police officers of the St. Louis Metropolitan Police Department ("SLPD"), and the corporate employer of a local television news crew—are liable to plaintiffs for violation of their civil rights and for invasion of privacy. The action arises from the filming of the execution of a search warrant at plaintiffs' residence and the broadcast of the film on the local television news. The matter is now before the Court on the parties' cross-motions for summary judgment.

Count I of the second amended complaint, a § 1983 claim, is pled against defendants Clark, Mischeaux,

Padberg and Haar (collectively "the Police Board"), and police officers Boyer, Dell, Ricardson, Risk and Sloan, and asserts that the actions of these defendants violated plaintiff Sandra Parker's rights under the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the Constitution. Count II is Sandra Parker's state law invasion of privacy claim asserted against police officers Boyer, Dell, Richardson, Risk and Sloan. Count III alleges, pursuant to § 1983, that defendant Multi-Media KSDK, Inc. ("KSDK") violated Sandra Parker's rights under the First, Fourth, Fifth, Ninth and Fourteenth Amendments. In Count IV, Sandra Parker asserts a common law invasion of privacy claim against KSDK. Counts V through VIII are analogous to Counts I through IV, respectively, but are asserted on behalf of plaintiff Dana Parker.

Factual Background

For purposes of the instant motions, the following facts are undisputed. On February 9, 1994, at approximately 9:30 p.m., defendants Boyer, Dell, Risk and Sloan, along with officers Mark Franklin, Keith Washington and Tom Huesgen, all members of the SLPD's Mobile Reserve Unit, entered the residence occupied by plaintiffs at 5242 Maple, St. Louis, Missouri, for the purpose of executing a search warrant for cocaine, hereoin, weapons, currency and drug transaction records on those premises. The officers were accompanied by a KSDK reporter, Randy Jackson, and camera operator, Jeff McCollum, who rode to the scene in a police car with Officers Boyer and Dell. The KSDK cameraman filmed the execution of the search warrant, including footage in which both plaintiffs appear.

Prior to February 9, Randy Jackson of KSDK had contacted persons assigned to the Mobile Reserve Unit, making them aware that he was interested in pursuing a television news story about law enforcement efforts against illegal weapons. He received a call on the morning of February 9, informing him that a weapons investigation was in progress which he might cover. At about the time

of the evening shift's roll call at 6:00 p.m., Sgt. Risk informed Officer Boyer that KSDK personnel would be with Boyer on his shift that night. Sgt. Risk did not know at that time that the warrant for 5242 Maple would be executed that evening. Boyer hoped to execute it that evening, depending on whether he could confirm the presence of the target, Travis Martin, at the address. At approximately 9:00 p.m., Boyer was advised by an informant that Martin was in the house; Boyer then determined to execute the search warrant. The KSDK personnel were not aware until this time that a search warrant was to be executed.

The target of the search warrant, Travis Martin, is a relative of plaintiffs and was then a resident of the house. Martin was detained outside the house before the officers entered to conduct the search. The KSDK personnel entered the house behind the police through the unlocked front door. Two weapons and several quantities of cocaine, in both rock and powder forms, were seized during the search. Travis Martin was arrested for controlled substance and firearm offenses, but no charges were ultimately filed against Travis Martin or anyone else as a result of the execution of the search warrant.

The KSDK personnel were not given any instructions or directions by any police officers, and were not advised by them of any limitations on their location, conduct or filming. No defendant sought or obtained plaintiffs' oral or written permission to film during the search or to broadcast any portion of the film. Neither did either plaintiff, any defendant, or any other person ask or direct the KSDK personnel to leave the premises. Later the same night, the KSDK personnel accompanied some of the same officers during the execution of another search warrant in a different residence. All or part of the film shot by KSDK was broadcast on KSDK's local news broadcasts on February 9, February 10, February 11 and May 6, 1994.

Lt. Richardson, then commander of the Mobile Reserve Unit, arrived at 5242 Maple after the search had been executed. In his deposition, Lt. Richardson testified that officers on the scene told him that occupants of the house had given their permission for the KSDK personnel to be present and to film inside the house. Lt. Richardson further testified that it was his policy to exclude the media from the scene of a search unless the scene was "secure" and the media had obtained permission from those involved. On the night of the search, Lt. Richardson assumed that his policy had been complied with, and that the KSDK personnel had entered the house only after the search was concluded and the house secured, and with the permission of the occupants.

In his deposition, Police Chief Harmon indicated that no formal or written policy existed as to media personnel accompanying police in the performance of their duties. Chief Harmon testified that he or an Assistant Chief would screen most such requests by the media, with input from the department's Public Information Office. In evaluating such a request, Chief Harmon's primary concerns are the physical safety of all involved, the potential for interference in police activity, the proposed subject matter of the media report and its potential effect on the public perception of the police. Chief Harmon's testimony indicated his view that it would be the responsibility of the media personnel to obtain from individual citizens any permission necessary in connection with media coverage, but that if such permission had not been obtained, the supervising officer on the scene should not allow the media to enter a residence, on the ground that such an entry would constitute a trespass.

KSDK and The State Action Requirement of § 1983

In order to recover against KSDK under § 1983, as pled in Counts III and VII of the second amended complaint, plaintiffs must demonstrate that KSDK violated

plaintiffs' constitutional rights under color of state law. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150 (1970). As explained by the Supreme Court in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982):

> Careful adherence to the "state action" requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power. It also avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed. A major consequence is to require the courts to respect the limits of their own power as directed against state governments and private interests. Whether this is good or bad policy, it is a fundamental fact of our political order.

Id. at 936-37. *Lugar* provides a two-pronged approach to the state action requirement. First, "the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible." *Id.* at 937. Second, "the party charged with the deprivation must be a person who may fairly be said to be a state actor." *Id.*

KSDK is not alleged to have acted in accordance with a rule of conduct imposed by the State and is not an entity for whom the State is responsible. Accordingly, only the first of the three alternatives of the first *Lugar* prong appears to have any potential application. KSDK's allegedly unconstitutional conduct—entry into plaintiffs' home and the recording and broadcasting of objects and events inside the home—was not, in the words of *Lugar*, "caused by the exercise of some right or privilege created by the State." At most, KSDK's acts were committed parallel to and contemporaneous with the police officers' exercise of privileges under state law in the execution of a lawfully obtained search warrant. The first prong of the two-part *Lugar* test is therefore not met.

A common standard for the application of the second prong of the *Lugar* test is whether the private party acted as "a willful participant in joint activity with the State or its agents." *United States v. Price*, 383 U.S. 787, 794 (1966); *see also Murray v. Wal-Mart, Inc.*, 874 F.2d 555, 558-59 (8th Cir. 1989). On the undisputed facts presented in this case, the Court is persuaded as a matter of law that KSDK was not a state actor for purposes of § 1983. The Eighth Circuit has held that private party liability under § 1983 requires "a mutual understanding, or a meeting of the minds, between the private party and the state actor." *Mershon v. Beasley*, 994 F.2d 449, 451 (8th Cir. 1993). The record in this case yields no evidence to support such a mutual understanding or purpose on the part of the KSDK personnel and the police officers who conducted the search. The undisputed evidence indicates that the KSDK personnel had been allowed to "ride along" with Mobile Reserve Unit officers during their shift, and that when, in the course of that shift, a determination was made to execute this particular search warrant, the KSDK personnel came along. The passivity of this circumstance demonstrates the absence of any affirmative agreement between KSDK and the police concerning the particular conduct of KSDK which plaintiffs now challenge.

The entirely distinct purposes of the two groups bolster this conclusion, as well as the Court's ultimate determination that the allegedly unconstitutional conduct was not joint. The KSDK personnel were present for the purpose of gathering news and preparing a report for broadcast. The police were engaged in the conduct of law enforcement activity. The police did not participate in the filming of the objects and events in the house,[1] and the KSDK

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[1] Police officers were filmed conducting the search and making statements to the KSDK reporter; the police, in addition to the plaintiffs, were subjects of the media's coverage. The record discloses no evidence that the police in any way assisted the KSDK personnel in the newsgathering function other than as subjects.

personnel did not participate in the execution of the search. The facts in this case are in this respect easily distinguished from cases in which corporate security guards acted in concert with police in detaining a suspected shoplifter, *see Murray supra*, in which a corporate security guard was invited to accompany the police in executing a search warrant in a home in furtherance of the corporation's own investigation of the same alleged thefts, *Bills v. Aseltine*, 52 F.3d 596 (6th Cir. 1995), or in which private individuals were alleged to have conspired with law enforcement officials in the commission of vigilante acts, *see Price supra*. In the Court's view, then, the conduct of the police and of the media personnel in this case were entirely separate and distinct, and cannot be characterized as joint activity. Because the Court concludes as a matter of law that KSDK did not act under color of state law, KSDK will be granted summary judgment as to Counts III and VII of the second amended complaint.

Police Defendants and the Fourth Amendment Claim

Plaintiffs allege that the conduct of the police in allowing the KSDK personnel into their home and allowing them to film inside the home violated plaintiffs' rights under the Fourth Amendment to be free from unreasonable searches and seizures. In *Ayeni v. Mottola*, 35 F.3d 680 (2nd Cir. 1994), the Second Circuit confronted similar issues arising from a CBS television crew's accompanying Secret Service agents in the execution of a search warrant in the Ayenis' home. Although *Ayeni* was an interlocutory appeal of the district court's rejection of the defendant's qualified immunity defense, the court's discussion plainly indicates its view as to the underlying question whether the facts presented a constitutional violation.

The foundation of the Second Circuit's opinion is its observation that:

> The protection of privacy from encroachment by governmental officers is the " 'principal' object of the [Fourth] Amendment." The home has properly been regarded as among the most highly protected zones of privacy, and "the sanctity of private dwellings [is] ordinarily afforded the most stringent Fourth Amendment protection."

Id. at 684-85 (citations omitted). After a discussion of the express limitations of the warrant as to both its scope and the persons—i.e., law enforcement officers—authorized by it to conduct any search and seizure, the Second Circuit held that:

> Mottola exceeded well-established principles when he brought into the Ayeni home persons who were neither authorized by the warrant to be there nor serving any legitimate law enforcement purpose by being there. . . The unreasonableness of Mottola's conduct in Fourth Amendment terms is heightened by the fact that, not only was it wholly lacking in justification based on the legitimate needs of law enforcement, but it was calculated to inflict injury on the very value that the Fourth Amendment seeks to protect—the right of privacy. The purpose of bringing the CBS camera crew into the Ayenis' home was to permit public broadcast of their private premises and thus to magnify needlessly the impairment of their right of privacy.

Id. at 686. For these reasons, the court concluded:

> (1) that the Fourth Amendment's prohibition on unreasonable searches forbade Mottola's action in bringing the CBS camera crew into the Ayenis' home, (ii) that the right of the Ayenis to be protected under the Fourth Amendment from an agent's bringing into their home persons not expressly nor impliedly authorized to be there, such as a television camera crew, was "clearly established" at the time

> of the search, and (iii) that Mottola could not with objective reasonableness have believed that his action was consistent with the Fourth Amendment.

Id.

Upon careful consideration of the facts presented in this case, this Court is persuaded to adopt the reasoning of the Second Circuit in *Ayeni*, which, although not directly binding on this Court, is a thorough and authoritative consideration of the substantive Fourth Amendment question here at issue. As alluded to earlier, the rationale and conclusions of *Ayeni* yield not only a determination that the officers responsible for the KSDK personnel's presence in the plaintiffs' home are not entitled to qualified immunity, but yield further the determination as a matter of law that plaintiffs are entitled to summary judgment as to liability on their Fourth Amendment claim under § 1983. The number of defendants in this case requires further consideration as to which officers should be held liable, and whether liability reaches the Board of Police Commissioners.

Individual liability of government officials under § 1983 must be predicated on "a causal connection between the misconduct complained of and the official sued." *Harris v. Pirch*, 677 F.2d 681, 685 (8th Cir. 1982), quoted with approval in *Wilson v. City of North Little Rock*, 801 F.2d 316, 322 (8th Cir. 1986). Supervisory personnel are not liable absent "direct responsibility for the improper action" or "personal involvement of the officer being sued." *Harris*, 677 F.2d at 685 (citations omitted). On the undisputed facts presented by the record, the Court concludes that Officer Boyer and Dell are subject to summary judgment as to liability in plaintiffs' favor. Boyer and Dell were the most directly involved in the determination to allow the media personnel access to the plaintiffs' house during the execution of the warrant. Boyer had obtained the warrant, made the decision when to execute it, and Boyer and Dell together brought the

reported and cameraman to the house in their patrol car. In addition, Sgt. Risk is liable as the supervisory officer who directed Boyer and Dell to allow the KSDK personnel to accompany them on their shift and who was present on the scene to supervise the execution of the search warrant. The facts do not support liability against Lt. Richardson, who was not aware that a search was to be executed or that the media personnel were allowed to accompany the officers executing the search without the occupants' permission, or against Sgt. Sloan, as to whom the facts fail to indicate any direct involvement in the media's presence. The Court will grant plaintiffs partial summary judgment on Fourth Amendment grounds as to individual liability only against defendants Boyer, Dell and Risk on Counts I and V of the second amended complaint. Defendants Richardson and Sloan are entitled to summary judgment on the Fourth Amendment claim asserted in Counts I and V.

To the extent plaintiffs assert any claims against the individual officers in their official capacities, and have asserted claims against the members of the Board of Police Commissioners, plaintiffs seek to impose liability on the City of St. Louis itself. *Brandon v. Holt*, 469 U.S. 464, 471-72 (1985). Such liability is governed by the standards of *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978), such that liability can be found "only where the municipality *itself* causes the constitutional violation at issue." *City of Canton, Ohio v. Harris*, 489 U.S. 378, 385 (1989) (emphasis in original). Plaintiffs could prevail on such a claim by demonstrating that "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation or decision officially adopted and promulgated by [the City's] officers." *Monell*, 436 U.S. at 690. The record is devoid of any evidence that there exists an official policy of the City or its police department to allow media personnel access to private premises in which search warrants are executed.

Neither do plaintiffs present evidence of an unwritten policy or custom allowing the practice. The Eighth Circuit has held that municipal liability on the basis of custom requires "a pattern of 'persistent and widespread' unconstitutional practices which became so 'permanent and well settled' as to have the effect and force of law." *Jane Doe A v. Special School District*, 901 F.2d 642, 646 (8th Cir. 1990), *citing Monell*, 436 U.S. at 691. Although the deposition testimony of various defendants indicates that media "ride-alongs" with SLPD officers are a fairly common occurrence, there is no evidence of any incidents of media entry into a home, without the occupant's consent, concurrent with the execution of search warrant, other than the two instances on the night here at issue. The present record therefore supports a determination as a matter of law that plaintiffs cannot establish the type of widespread pattern and practice which is a necesary predicate for official liability. Accordingly, the Court will grant summary judgment on the Fourth Amendment claims asserted in Counts I and V to the members of the Police Board and to all other defendants in their official capacities.

§ 1983 Claims Based on the 1st, 5th, 9th and 14th Amendments

In addition to the Fourth Amendment, plaintiffs' § 1983 claims in Counts I and V also allege liability for violations of plaintiffs' rights under the First, Fifth, Ninth and Fourteenth Amendments. The Court agrees with defendants that plaintiffs have not pled facts which could support any liability under the First Amendment. Defendants also correctly point out that the Due Process Clause of the Fifth Amendment applies only to the federal government. *See, e.g., Public Utilities Comm'n v. Pollak*, 343 U.S. 451, 461 (1952). The Ninth Amendment provides that "[t]he enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." The Court readily concludes as a

matter of law that the Ninth Amendment affords plaintiffs no distinct cause of action. For the foregoing reasons, the Court will grant all defendants summary judgment on Counts I and V to the extent that they assert claims based on the First, Fifth and Ninth Amendments.

The Court further concludes that all defendants are entitled to summary judgment on plaintiffs' Fourteenth Amendment claim for infringement of their right to privacy. In *Holman v. Central Arkansas Broadcasting Co., Inc.*, 610 F.2d 542 (8th Cir. 1979), the Eighth Circuit held that "no right to privacy is invaded when state officials allow or facilitate publication of an official act such as an arrest." *Id.* at 544. In so holding, the Eighth Circuit cited *Paul v. Davis*, 424 U.S. 693, 712-13 (1976), in which the Supreme Court declined to enlarge the Fourteenth Amendment privacy protection to include a claim that the State may not publicize a record of an official act such as an arrest. More recently, the Eighth Circuit has held that the confidentiality interest which is secured by the Fourteenth Amendment is violated only where the information disclosed is "either a shocking degradation or an egregious humiliation . . . to further some specific state interest, or a flagrant breech of a pledge of confidentiality which was instrumental in obtaining the personal information." *Alexander v. Peffer*, 993 F.2d 1348, 1350 (8th Cir. 1993). The facts of this case do not present such a scenario.

The intrusion into the privacy of the home in connection with the search is the focus of the constitutional deprivation alleged in this case, and that focus places the issue more squarely within a Fourth Amendment analysis. As the Second Circuit observed in *Ayeni*, 35 F.3d at 691, the Supreme Court has explained that where "the Fourth Amendment provides an explicit textual source of constitutional protection against [a particular sort] of physically intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due proc-

ess,' must be the guide for analyzing those claims." *Graham v. Connor*, 490 U.S. 386, 395 (1989). For these reasons, the Court concludes that plaintiffs' Fourteenth Amendment claim is unavailing, and all defendants are entitled to summary judgment on Counts I and V to the extent that they assert a Fourteenth Amendment claim.

Supplemental Claims under Missouri Law

Counts II, IV, VI and VIII contain each plaintiff's state law tort claims for invasion of privacy, against the individual police officer defendants and against KSDK. Plaintiffs' motion for partial summary judgment indicates that plaintiffs pursue these claims on each of three different privacy theories under Missouri law: intrusion upon seclusion, public disclosure of private facts, and false light publicity. In addition to the plaintiffs' invocation of three distinct theories of tort liability, the state law claims potentially raise issues concerning defenses specifically available to the KSDK defendants as members of the press, and to the police defendants based on official immunity.

In view of the Court's disposition of the merits of the claims over which it has original jurisdiction, and in view of the novel and complex issues of state law presented on the facts of this case, the Court declines to exercise supplemental jurisdiction over the state law claims. The factors supporting this determination, as set forth above, are codified in 28 U.S.C. § 1367(c)(1) through (3). For all the foregoing reasons, the Court is persuaded that the state coures are the forum in which the contours of Missouri's privacy torts should be examined for potential application to the unique facts presented by plaintiffs' claims. The Court will therefore dismiss Counts II, IV, VI and VIII without prejudice to their being reasserted in state court.

Conclusion

Following the entry of partial summary judgment in plaintiffs' favor against defendants Boyer, Dell and Risk, the sole remaining question in this case is plaintiffs' damages on their Fourth Amendment claim. All other claims have been disposed of either by dismissal or by summary judgment in defendants' favor. The case remains set on the trial docket commencing November 6, 1995. Accordingly,

IT IS HEREBY ORDERED that plaintiffs' motion for partial summary judgment [Doc. #46] is granted in part and denied in part.

IT IS FURTHER ORDERED that defendant Multi-Media KSDK, Inc.'s motion for summary judgment [Doc. #49-1] is granted in part and denied in part, and its request for oral argument [Doc. #49-2] is denied as moot.

IT IS FURTHER ORDERED that the motion of defendants Clarke, Mischeaux, Padberg, Haar, Boyer, Dell, Richardson, Risk and Sloan to dismiss or in the alternative for summary judgment [Docs. #47-1 & #47-2] is granted in part and denied in part.

/s/ [Illegible]
United States District Judge

Dated: 10/31/95

[Filed Oct. 31, 1995]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 4:94CV1693-DJS

SANDRA C. PARKER, Individually and as next friend of Dana M. Parker, and DANA M. PARKER,
Plaintiffs,

vs.

ANNE-MARIE CLARKE, CHARLES E. MISCHEAUX, MATTHEW J. PADBERG, ROBERT T. HAAR, RODNEY BOYER, DAN DELL, JOSEPH RICHARDSON, SIMON RISK, TERRENCE SLOAN and MULTI-MEDIA KSDK, INC.,
Defendants.

PARTIAL SUMMARY JUDGMENT

IT IS HEREBY ORDERED, ADJUDGED and DECREED that partial summary judgment on the issue of liability only is entered in favor of plaintiffs and against defendants Rodney Boyer, Dan Dell and Simon Risk, on the Fourth Amendment claim asserted by plaintiff Sandra Parker in Count I of the second amended complaint and by plaintiff Dana Parker in Count V. The issue of damages on these claims remains pending.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that in all other respects, summary judgment is entered in favor of defendants Anne-Marie Clarke, Charles E. Mischeaux, Matthew J. Padberg, Robert T. Haar, Rodney Boyer, Dan Dell, Joseph Richardson, Simon Risk, Terrence Sloan as to the remainder of Counts I and V.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that summary judgment is entered in favor of defendant Multi-Media KSDK, Inc. on Counts III and VII.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the remaining counts of the second amended complaint, Counts II, IV, VI and VIII are dismissed without prejudice pursuant to 28 U.S.C. § 1367(c)(1).

/s/ [Illegible]
United States District Judge

Dated: 10/31/95

No. 96-883

Supreme Court, U.S.
FILED
JAN 21 1997
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

SANDRA PARKER, Individually and as the Next Friend of DANA M. PARKER, and DANA M. PARKER,

Petitioners,

vs.

RODNEY BOYER, DAN DELL, SIMON RISK, and MULTI-MEDIA KSDK, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI OF RESPONDENTS RODNEY BOYER, DAN DELL, AND SIMON RISK

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Rodney Boyer, Dan Dell, and Simon Risk respectfully request that this Court deny the petition for writ of certiorari seeking review of the Eighth Circuit's decision in this case. That decision is reported at 93 F.3d 445.

STATEMENT OF THE CASE

Plaintiff-Petitioners Sandra Parker, individually and as next friend of Dana M. Parker, and Dana M. Parker filed this action pursuant to 42 U.S.C. §1983 and Missouri law. The Parkers asserted federal and state law claims against numerous defendants in connection with the entry of the media into the Parkers' residence where police officers were executing a valid search warrant. Among other things, the Parkers alleged that Defendant-Respondent St. Louis City police officers Rodney Boyer, Dan Dell, and Simon Risk violated the Parkers' federal constitutional rights under the Fourth Amendment. The Parkers also asserted constitutional claims against Defendant-Respondent Multi-Media KSDK, Inc. (KSDK).

In their petition for writ of certiorari, Petitioners refer to a number of "facts," without referring to authority for them, which were neither undisputed on the summary judgment record nor found to be true in any proceeding below. The limited undisputed evidence on the summary judgment record, as recounted in the district court and Eighth Circuit opinions, showed in part the following. On February 9, 1994, at or around 6:00 p.m., Respondents Boyer and Dell were instructed at their roll call that they would be accompanied in their patrol car that evening by two employees of KSDK. During the course of their patrol, officers Boyer and Dell were presented with the opportunity to execute a valid search warrant which Boyer previously had obtained in order to search for controlled substances and firearms at the private residence located at 5242 Maple in St. Louis,

Missouri. At approximately 9:00 p.m., officers Boyer and Dell notified other members of the St. Louis City Police Department's Mobile Reserve Unit of the impending search, and other officers then responded at an agreed upon location near the Maple address.

Approximately seven responding officers—including Boyer, Risk, and Dell—proceeded to 5242 Maple to execute the search warrant. The resident individual targeted for possession of the items listed in the search warrant, Travis Martin, was detained by officers outside the residence. The officers made an unforced entry into the residence through the unlocked front door. In a search of the residence, officers recovered a .380 caliber pistol, a Cobray M-11 9 mm. assault pistol, and bags of a substance believed to be cocaine.

KSDK employees entered the residence behind the police, and took film footage and interviewed some of the police officers and some of the occupants of the residence. At some point during the course of the search, a Lieutenant arrived to supervise the scene. The detained suspect, Travis Martin, was arrested for controlled substance and firearm offenses.

At no time, either before, during or after the search, did any defendant police officer advise or give permission to KSDK personnel to enter the premises, take film footage or interview any occupant of 5242 Maple. Nor did any employee of KSDK request permission from any defendant police officer to enter the premises, take film footage or interview any occupant of 5242 Maple. Further, at no time did any occupant of the house ask any defendant police officer to prevent or stop KSDK from entering the premises, to have KSDK leave the premises, or to prevent KSDK from filming or interviewing. No other details appear on the record regarding the role of Respondents Risk, Boyer, or Dell with respect to the media. (Petitioner's App. 2a-4a, 17a-20a.)

Based on the foregoing, the district court entered its order granting partial summary judgment in favor of the Parkers and against Respondents Boyer, Dell and Risk, on the Parkers' Fourth Amendment claim. The district court granted summary judgment in favor of certain other defendants, including Respondent KSDK. The district court subsequently issued an amended judgment clarifying that it had rejected Boyer, Dell, and Risk's qualified immunity defense. (App. 15a, 30a.)

On interlocutory appeal, the Eighth Circuit Court of Appeals reversed the finding of liability against officers Boyer, Dell, and Risk and held the officers protected by qualified immunity for their limited roles in allowing KSDK to enter the premises and film portions of the search. The Eighth Circuit also upheld the district court's ruling that KSDK had not acted under color of state law, as it was undisputed that KSDK acted independently in deciding to enter the house and film and that neither KSDK nor the police assisted the other in their respective tasks. (App. 4a-6a.) The Court of Appeals then denied Petitioners' request for a rehearing en banc. (App. 10a.)

Petitioners now request that this Court grant certiorari, asserting, among other arguments, that the Eighth Circuit decision conflicts with *Ayeni v. Mottola*, 35 F.3d 680 (2nd Cir. 1994), *cert. denied*, 115 S.Ct. 1689 (1995), and that the Eighth Circuit's qualified immunity analysis is otherwise flawed.

REASONS FOR DENYING THE PETITION

I. The Petition Should Be Denied Because The Claimed Conflict With The Second Circuit Does Not Justify Granting A Writ of Certiorari.

Contrary to Petitioners' argument, the decision below does not conflict with *Ayeni v. Mottola*, 35 F.3d 680 (2nd Cir. 1994), *cert. denied*, 115 S.Ct. 1689 (1995), nor did *Ayeni* present a scenario identical to the one now before the Court. Further, even to the extent that this Court might conclude the decision below is inconsistent with *Ayeni*, such an inconsistency does not justify granting a writ of certiorari.

In *Ayeni*, the Second Circuit was presented with a factual scenario in which a secret service agent "invited" a CBS news crew into a home while conducting a search, the occupant of the home verbally objected to the videotaping of herself and her son and tried to hold a magazine to shield her and her son's faces, and the secret service agent responded by "grab[bing] the magazine out of [the plaintiff's] hand, thr[owing] it on the floor, and [telling] the plaintiffs to `shut up.'" 35 F.3d at 683. Agents then "*directed* the camera crew to videotape Mrs. Ayeni's face." *Id.* The *Ayeni* court held that the agent was not entitled to qualified immunity as his actions violated well-established general Fourth Amendment principles, even though the court could not point to any pre-existing case law or published text addressing the contours of the Fourth Amendment right at issue. *Id.* at 686.

In the decision below, the Eighth Circuit noted the existence of *Ayeni* but did not criticize the case or characterize it as in conflict with its own decision. While declining to conclude that the broad activity of "allowing" media entry into a home during a search violated self-evident Fourth Amendment principles, the Eighth Circuit held simply in the fact-specific context before it, "we cannot say that the kind of conduct in which police engaged in this case was a violation of a clearly established constitutional

principle of which the police, at the time they executed their search warrant, should have been aware." (App. 5a.)

Thus, while *Ayeni* and the present case both pertain to the presence of media during a search of a home, they present different factual scenarios—*Ayeni* a much more egregious one—and accordingly different results as to whether the particular defendants involved were protected by qualified immunity. Moreover, even if the results of the two cases can be said to be inconsistent, it is not an inconsistency warranting resolution by this Court. The specific contexts of the cases are not likely to recur, and there is plenty of room for development of precedent at the court of appeals level to further define the contours of the Fourth Amendment right at issue.

II. The Petition Should Be Denied Because The Eighth Circuit Correctly Decided Based On The Factual Circumstances Of This Case that Respondents Boyer, Dell, and Risk Are Protected By Qualified Immunity.

Admittedly, the Eighth Circuit chose not to engage in a protracted discussion of the contours of the Fourth Amendment right arguably at issue in this case, as the court concluded that the individual Respondent officers in any event would be protected by qualified immunity. This method of analysis, does not, however, warrant the grant of a writ of certiorari.

If this Court grants Petitioners' request for a writ of certiorari in this interlocutory appeal, a main issue before the Court will be whether the Respondent police officers were protected by qualified immunity for their alleged actions. In such an inquiry, it is important that the conduct is analyzed in its particularized context, and the question is whether the "contours of the right" allegedly violated were sufficiently clear when the official acted so that his conduct violated a clearly established statutory or constitutional right of which he should have known. *See Anderson v. Creighton*, 483 U.S. 635, 640 (1987); *Mitchell v. Forsyth*,

472 U.S. 511, 530 (1985); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

Qualified immunity protects all but the plainly incompetent or those who knowingly violate the law. *Hunter v. Bryant*, 502 U.S. 224, 229 (1991).

Based on the little or no interaction that Respondent officers had with the media in this case, and based on the dearth of case law relevant to the officers' conduct published at the time of their conduct in February 1994, the Eighth Circuit correctly decided that, even if Petitioners' Fourth Amendment rights were implicated, the Respondent officers were protected by qualified immunity. Thus, the respective rights and liabilities of the parties would not be changed by the grant of a writ of certiorari. Further, based on the factual record, this case simply does not present a scenario which, if analyzed more deeply in the context of the Fourth Amendment, would lead to a definition of the contours and boundaries of the Fourth Amendment right arguably at issue.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

SANDRA PARKER, Individually, and as the Next Friend of DANA M. PARKER, and DANA M. PARKER,

Petitioners,

vs.

RODNEY BOYER, DAN DELL, SIMON RISK, and MULTI-MEDIA KSDK, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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THE QUESTIONS PRESENTED FOR REVIEW

I

Did the Court of Appeals correctly determine that Respondent Police Officers were entitled to qualified immunity because at the time of the alleged constitutional violation it was not clearly established that the Fourth Amendment prohibits law enforcement officers from allowing members of the news media to observe and film a search on private property, where at the time of the search most, if not all, courts had refused to hold such activity to be unconstitutional?

II

Did the Court of Appeals correctly determine that Respondent Police Officers were entitled to qualified immunity without first determining whether the constitutional right Petitioners sought to vindicate in fact exists, when deciding this case on that basis avoided needlessly reaching and resolving a complex constitutional question?

III

Did the Court of Appeals correctly determine that KSDK was not a state actor for purposes of 42 U.S.C. § 1983, when, acting on its own initiative and solely for newsgathering purposes, KSDK's news crew entered a private residence to observe and film a search by local law enforcement officials therein, without participating in, aiding or orchestrating the search, and without prior authorization, direct assistance or express permission from the law enforcement officials conducting the search?

RESPONDENT'S OBJECTIONS TO PETITIONERS' QUESTIONS PRESENTED FOR REVIEW

Respondent Multimedia KSDK, Inc. ("KSDK") objects to Petitioners' Questions Presented for Review, in that Questions I and III contain misstatements of fact that are directly contradicted by the findings of undisputed fact in the courts below. Specifically, KSDK objects to the Petitioners' statement in Question I that Respondents Boyer, Dell and Risk "assisted" KSDK in entering the Parker residence. Similarly, KSDK objects to Petitioners' statement in Question III that KSDK "entered Petitioners' home with direct assistance and permission of Respondent Police Officers ...." Both of these statements are contradicted by the findings of undisputed facts in the courts below. *See Parker v. Boyer*, 93 F.3d 445, 448 (8th Cir. 1996)("It is undisputed that KSDK acted independently of the police in deciding to enter the house and videotape the events there and that neither KSDK nor the police assisted the other in the performance of their separate and respective tasks."). Accordingly, Respondent Multimedia, KSDK, Inc., while denying that this case presents any issues that warrant this Court's review, respectfully submits the Questions Presented for Review as set forth on the preceding page.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

Amendment I to the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

1. The Undisputed Facts.

Petitioners' Statement of the Case contains misstatements of fact. Such misstatements have been noted where they are of particular significance to this Court's consideration of the Petition.

Respondent Multimedia KSDK, Inc. ("KSDK") is a television station operating in St. Louis, Missouri, and a member of the professional news media. (Joint Appendix ("App.") 284.) KSDK is the proprietor of a local news program known as "NewsChannel 5," which airs in and around the City of St. Louis. (App. 284.)

In or about February, 1994, a KSDK reporter, Randy Jackson, was developing a story regarding the St. Louis Police Department's ("SLPD") weapons suppression program.[1] To report this story accurately, Mr. Jackson sought and obtained permission from the SLPD for a KSDK news crew to ride along[2] with SLPD's Mobile Reserve Unit

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[1] Unless otherwise noted by citation to the record below, these and the following facts are taken from the District Court's findings of undisputed fact. *See Parker v. Clarke*, 905 F.Supp. 638, 640-41 (E.D. Mo. 1995)

[2] A ride along is not an uncommon, but a routine method of newsgathering in which reporters ride along with police officers as they carry out police business. Indeed, the SLPD has an informal custom and practice of allowing members of the professional news media such as KSDK to engage in ride alongs. Accordingly, SLPD approved

(Footnote 2 continued on next page)

("MRU"), the unit responsible for executing the weapons suppression program. On the morning of February 9, 1994, the SLPD gave Mr. Jackson and a KSDK camera operator permission to ride along with MRU officers during that evening's shift.[3]

At approximately 9:00 p.m., the MRU officers with whom the KSDK news crew was riding decided to execute a search warrant for cocaine, heroin, weapons, currency and drug transaction records at the house Plaintiffs-Petitioners Sandra C. Parker ("S. Parker") and Dana M. Parker ("D. Parker") (collectively "the Parkers" or "Petitioners") occupy along with numerous relatives.[4] The KSDK news crew was not

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(Footnote 2 continued)

Mr. Jackson's request and permitted KSDK to ride along with MRU officers on the night of February 9, 1994. Petitioners attempt to transmute the SLPD's granting permission for a generic ride along into an affirmative agreement between the SLPD and KSDK that the news crew would enter the Parker residence to observe and film the search. The District Court, however, rejected the Parkers' invitation to engage in such a broad leap in logic and expressly found that there was no "affirmative agreement between KSDK and the police concerning the particular conduct of KSDK which plaintiffs now challenge." 908 F.Supp. at 642.

[3] The permission sought and obtained extended only to riding along in the officers' squad car. At no time did KSDK discuss with police officers the issue of what the KSDK news crew would do during the ride along or whether they would enter any residence the officers might search. 905 F.Supp. at 641. In arguing to the contrary, Petitioners go so far as to claim that "[p]ermitting news media to be present during searches is consistent with City's police department policy and practice, even when the home's residents have not consented to the broadcast of their images." Petition, p. 5. The District Court, however, in sharp contrast to Petitioners' assertions, found that "[a]lthough the deposition testimony of various defendants indicates that 'media ride-alongs' with SLPD officers are a fairly common occurrence, there is no evidence of any incidents of media entry into a home, without the occupant's consent, concurrent with the execution of [a] search warrant, other than the two instances on the night here at issue." 905 F.Supp at 644.

[4] Petitioners claim that "[n]o arrests were ever made nor any illegal weapons or drugs discovered as a result of this search." *See* Petition, p. 4. This is not true. As the District Court held below: "Two weapons and several substances believed to be cocaine, in both rock and powder form, were seized during the search. Travis Martin [the target of the search, a relative of the Parkers and at one point a resident of the house] was arrested for controlled substance and firearms offenses, but no charges ultimately were filed against Travis Martin or anyone else as a result of the execution of the search warrant." 908 F.Supp. at 641.

aware until they arrived at the house that a search warrant was to be executed.[5] When the MRU officers began to execute the search warrant, the KSDK news crew, acting on its own initiative, decided to cover this breaking news and entered the premises and videotaped the search (App. 273), which later was broadcast on KSDK's news program.

The police did not specifically invite the KSDK news crew to enter the residence and did not even realize initially that the news crew had followed police inside. (App. 176-77.) Neither the police nor any occupant of the house, including the Petitioners, gave any indication that they objected to KSDK's entry onto the premises. To the contrary, the occupants, despite recognizing the KSDK news crew as members of the local media, appeared to be agreeable to their presence. (App. 225, 230, 233-34, 241, 274, 352.)

Once inside the house, the KSDK camera operator filmed portions of the police search while Mr. Jackson observed and gathered information for his news report. The SLPD never directed or encouraged the KSDK news crew to report or film the search, where to go in the house or what aspects of the search to report or film. Similarly, the KSDK news crew did not encourage or solicit the execution of the search, participate in any way in the search, orchestrate police activity during the search, or aid or assist the SLPD in conducting the search.

Although KSDK did not obtain the Petitioners' or any other occupant's *express* consent to be filmed, at no time did any of the occupants, including the Petitioners, act in such a way that would suggest they objected to the presence of the KSDK news crew. To the contrary, the occupants of the home willingly conversed with the KSDK news crew as the crew and the occupants waited in the living

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[5] Petitioners' statement of the case baldly asserts that MRU officer Boyer told Mr. Jackson and Mr. McCollum when they first met for the ride along that the officers would be executing a search warrant that night. Petitioners also assert in contravention of the record below that Officer Risk knew at that evening's roll call that the KSDK news crew would be accompanying the Police Officers during the search. (*See* Petition, p. 3). However, the District Court's findings of undisputed fact establish that KSDK first learned of the search at the Parker residence at approximately 9:00 p.m., as the MRU officers began to execute the search warrant at that location. *See* 908 F.Supp. at 641.

room while the SLPD searched the house. (App. 309, 319.) Neither Petitioner, nor any of the other occupants, asked the KSDK news crew to leave the house, indicated in any way that they did not want to be filmed, or asked the KSDK news crew not to broadcast film of the search. (App. 285, 299, 315, 321, 326, 330, 337, 341.)

Following the search, KSDK broadcast Mr. Jackson's story regarding the weapons suppression program, including several seconds of film recorded during the search. At no time either before or after this initial broadcast did Petitioners or anyone acting on their behalf ever ask KSDK not to air the videotape filmed during the search.

2. The District Court Action.

In their District Court action, Petitioners alleged that KSDK and numerous City defendants violated their federal civil rights under 42 U.S.C. § 1983 and invaded their state law privacy rights as a result of KSDK's coverage of the search. The District Court granted summary judgment in favor of KSDK on Petitioners' § 1983 claim, finding that, based on the undisputed facts, KSDK was not a state actor under *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 924 (1982). *Parker v. Clarke*, 905 F.Supp. 638, 641-43 (E.D. Mo. 1995).[6] In holding that KSDK was not a state actor, the District Court first determined that

> KSDK's allegedly unconstitutional conduct — entry into plaintiffs' home and the recording and broadcasting of objects and events inside the home — was not, in the words of *Lugar*, "caused by the exercise of some right or privilege created by the State." At most, KSDK's acts were committed parallel to and contemporaneous with the police officers' exercise of privileges under state law in the execution of a lawfully obtained search warrant. (*Parker*, 905 F.Supp. at 642.)

The District Court then determined that Petitioners failed to satisfy the second *Lugar* prong, which requires them to establish that KSDK "may fairly be said to be a state actor", because Petitioners could not establish that KSDK was a "willful participant in joint activity with the

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[6] The District Court simultaneously denied the Parkers' motion for summary judgment against KSDK as to liability on the same constitutional claim.

State or its agents." 908 F.Supp. at 642-43. The District Court based this conclusion on its finding that:

> [t]he undisputed evidence indicates that the KSDK personnel had been allowed to "ride along" with the [MRU] officers during their shift, and that when, in the course of that shift, a determination was made to execute this particular search warrant, the KSDK personnel came along. The passivity of this circumstance demonstrates the absence of any affirmative agreement between KSDK and the police concerning the particular conduct of KSDK which Plaintiffs now challenge. (*Parker*, 905 F.Supp. at 642.)

Because Petitioners thus could not satisfy both prongs of the *Lugar* test, the District Court held that KSDK did not act under color of state law and granted summary judgment in favor of KSDK on Petitioners' Fourth Amendment based § 1983 claim.[7]

With respect to Petitioners' claims against the City, the SLPD and the individual police officers, the District Court, following the reasoning of the Second Circuit in *Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1689 (1985), rejected the qualified immunity defense of SLPD officers Boyer, Dell and Risk and granted summary judgment against only those defendants on Petitioners' § 1983 claim. 905 F.Supp. at 643-44. The District Court determined that, in "allow[ing]" the media to enter the Parker residence and tape the search, officers Boyer, Dell and Risk had not only violated clearly established Fourth Amendment principles, but also, as a matter of law, were liable on Petitioners' Fourth Amendment based § 1983 claim. *Id.*

3. The Decision of the United States Court of Appeals for the Eighth Circuit.

Petitioners appealed the District Court's state action decision in favor of KSDK, and Respondents Boyer, Dell and Risk appealed the

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[7] The District Court dismissed without prejudice Petitioners' pendent state law claims. Petitioners recently refiled those claims in Missouri state court against KSDK, Mr. Jackson and the KSDK camera operator Jeff McCollum, where such claims remain pending.

qualified immunity and Fourth Amendment decision, to the United States Court of Appeals for the Eighth Circuit. The Eighth Circuit affirmed the District Court's order granting summary judgment in favor of KSDK and reversed the summary judgment against the police officers. *Parker v. Boyer*, 93 F.3d 445 (8th Cir. 1996). In affirming the lower court's determination that KSDK was not a state actor, the Eighth Circuit concluded that Petitioners had not satisfied the first prong [8] of the *Lugar* test because

> [i]t is undisputed that KSDK acted independently of the police in deciding to enter the house and videotape the events there and that neither KSDK nor the police assisted the other in the performance of their respective tasks. The KSDK personnel did not execute the search warrant and they entered the house after the police did. The television station was there for reasons of its own and was engaged in a mission entirely distinct from the one that brought the police to the house. Seizing an opportunity to trespass is not the same as invoking a right or privilege. We agree with the district court that "at most, KSDK's acts were committed parallel to and contemporaneous with the police officers' exercise of privileges under state law in the execution of the search warrant," 905 F.Supp at 642, and that KSDK was not exercising a right or privilege created by the state when it decided to enter the Parkers' home to record the events taking place there. KSDK's entry into the Parkers' house and videotaping the events that occurred there was therefore not an act committed under color of state law." *Id.* (*citing Lugar*, 457 U.S. at 936).

In addition, the Court of Appeals, without reaching Petitioners' underlying Fourth Amendment claim, reversed the District Court's grant of summary judgment against officers Boyer, Dell and Risk, holding that they were entitled to qualified immunity because the specific rule announced in *Ayeni*, upon which the District Court based its decision, post-dated the allegedly unconstitutional search and thus could not be the basis for a denial of qualified immunity. *Id.* at 447.

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[8] The Court of Appeals did not review the District Court's application of *Lugar*'s second prong to the undisputed facts of this case.

Petitioners now request this Court to review the decisions of the Court of Appeals (1) reversing the District Court's grant of summary judgment against Officers Boyer, Dell and Risk, on the basis that the officers are entitled to qualified immunity, and (2) affirming the District Court's grant of summary judgment against Petitioners on their § 1983 claim against KSDK on the basis that KSDK was not acting "under color of law" when it entered Petitioners' residence and filmed the SLPD search therein.

REASONS FOR DENYING THE WRIT

This case does not present issues that warrant review by this Court because the Court of Appeals did not resolve them in direct conflict with the holdings of other federal courts of appeals or those of this Court. Even if the decision of the Court of Appeals can be stretched to create such a conflict, the issues presented herein should, at the very most, be allowed to mature and thereby become ripe for this Court's review by first percolating among the courts of appeals. Finally, and equally important, the Petition should be denied because the Court of Appeals correctly resolved those issues against Petitioners and properly determined that Respondents were entitled to summary judgment on Petitioners' § 1983 claim.

I. DID THE COURT OF APPEALS CORRECTLY DETERMINE THAT RESPONDENT POLICE OFFICERS WERE ENTITLED TO QUALIFIED IMMUNITY BECAUSE AT THE TIME OF THE ALLEGED CONSTITUTIONAL VIOLATION IT WAS NOT CLEARLY ESTABLISHED THAT THE FOURTH AMENDMENT PROHIBITS LAW ENFORCEMENT OFFICERS FROM ALLOWING MEMBERS OF THE NEWS MEDIA TO OBSERVE AND FILM A SEARCH ON PRIVATE PROPERTY, WHERE AT THE TIME OF THE SEARCH MOST, IF NOT ALL, COURTS HAD REFUSED TO HOLD SUCH ACTIVITY TO BE UNCONSTITUTIONAL?

The Eighth Circuit Court of Appeals correctly determined that Respondents Risk, Boyer and Dell are entitled to qualified immunity with respect to Petitioners' claims based on the state of the law at the time of the search in question. Petitioners now assert that the Eighth

Circuit decision below conflicts with the Second Circuit Court of Appeals' decision in *Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1689 (1995), thus justifying review by this Court. This is not so for two reasons. First, *Ayeni* was decided after the search at issue herein and thus "cannot weigh in the balance against a finding of qualified immunity," as the Court of Appeals properly held below. *Parker*, 93 F.3d at 447. Thus, reliance on *Ayeni* would have violated the well-settled principle that "[i]n assessing claims of qualified immunity, we are of course required to examine the state of the relevant law at the time the officials committed the acts of which the plaintiffs complain." *Id.* at 447, *citing Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982); *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). At the time of the search of Petitioners' residence, "most courts had rejected the argument that the United States Constitution forbids the media to encroach on a person's property while the police search it." *See* 93 F.3d at 447, and cases cited therein.[9]

Second, the *Ayeni* and *Parker* decisions were based on such strikingly dissimilar facts that it cannot be said that the precise holdings of these decisions conflict. In *Ayeni*, the court confronted the issue of whether law enforcement officials are entitled to qualified immunity when they expressly invite members of the private news media into a private residence to film the execution of a search warrant therein and orchestrate the actions of the media during the search. Conversely, in the instant case, neither the City Respondents nor any other City official affirmatively or expressly invited KSDK into the residence. Nor did the City Respondents or any other City official orchestrate any of the media's actions inside the residence.

The two cases are further distinguishable in that the Ayenis, unlike Petitioners herein, expressly, repeatedly and vigorously objected to the media's filming them during the search. Conversely, despite recognizing the KSDK crew as members of the local media, neither Petitioner — nor any other occupant of the house — voiced or in any

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[9] It is noteworthy that the court in *Ayeni* inexplicably did not discuss, let alone distinguish, the contrary holdings of other courts properly considered by the Eighth Circuit below.

other way expressed any objection to KSDK's presence in the residence or the filming of the search.

Additionally, *Ayeni* involved federal law enforcement officials subject to the constraints of 18 U.S.C. § 3105, the federal warrant statute to which the *Ayeni* court looked for guidance, whereas the instant case involves local law enforcement officials whose conduct is not circumscribed by that federal statute. In light of these factual and analytical distinctions, it cannot be said that the decision of the Court of Appeals below directly conflicts with the qualified immunity decision of the Second Circuit in *Ayeni*.

Even if the many distinctions between the decision below and *Ayeni* are discounted, review by this Court is unwarranted at this time because any real or imagined conflict as to the state of the law in 1992 or 1994 will, in short order, resolve itself without this Court's intervention. Moreover, any tension between the decisions arises in the context of an immature and developing area of the law that has yet to "percolate" in the circuit courts of appeals. Indeed, the Court of Appeals below characterized *Ayeni* as "indicat[ing] at most only the beginnings of a trend in the law." In *United States v. Mendoza*, 464 U.S. 154 (1984), this Court reaffirmed its longstanding principle that several appellate courts should explore a particular issue before *certiorari* is granted. *Id.* at 160. Applying the *Mendoza* rule to this case commands the conclusion that the Petition should be denied.

Petitioners seek to avoid the operation of the *Mendoza* rule by arguing that two other courts of appeals, the Fourth Circuit in *Buonocore v. Harris*, 65 F.3d 347 (4th Cir. 1995), and the Sixth Circuit in *Bills v. Aseltine*, 52 F.3d 596 (6th Cir.), *cert. denied*, ___ U.S. ___, 116 S.Ct. 179 (1995) ("*Bills II*"), likewise have confronted this issue and resolved it in a manner that conflicts with the decision below. Close inspection of these decisions, however, demonstrates that, notwithstanding Petitioners' argument to the contrary, they do not conflict with the decision of the Court of Appeals below.

In *Buonocore*, the Fourth Circuit addressed issues factually and legally distinguishable from those presented by the instant case and therefore cannot support Petitioners' attempt to multiply any purported split of authority. The court there addressed the issue of

whether federal law enforcement officials can be liable under the Fourth Amendment when they invite a private corporate security officer to participate in a search, not to assist the officials in their search, but to engage in an independent search for items unrelated to those specified in the warrant. 65 F.3d at 358-59. Moreover, in *Buonocore*, the private party was present in a criminal investigative capacity, looking for evidence that would support its own private investigation for theft of its property by the plaintiff resident. *Id.* at 359 (plaintiff "alleged that law enforcement officers brought into his home a private person who was not assisting the officers in conducting a search but was on his own mission to recover property not mentioned in the warrant.").

Similarly, in *Bills v. Aseltine*, 958 F.2d 697, 704 (6th Cir. 1992) ("*Bills I*") the plaintiff claimed that state police officers violated the Fourth Amendment by inviting a General Motors security officer into the plaintiff's home "for the purpose of finding General Motors property, thereby discovering evidence that might be of some use in a prosecution unrelated to that involving" the property identified in the search warrant. *Id.* at 704. The district court granted summary judgment to the police officers. The Sixth Circuit reversed, concluding that genuine issues of material fact existed as to whether under these circumstance the search was unreasonable and thus violated the Fourth Amendment. *Id.* at 705.

Based on the undisputed and established facts of this case, it simply cannot be said that the decision below conflicts with the holdings of *Buonocore* and *Bills I* and *II*, which confronted facts wholly distinct from those at issue herein. As an initial matter, neither *Bills* (*I* and *II*) nor *Buonocore* involved simultaneous media coverage of an otherwise reasonable search and thus are distinguishable on this basis alone. Moreover, Respondents Dell, Boyer and Risk, in further contrast to the law enforcement officers in *Bills* and *Buonocore*, did not affirmatively "invite" or "bring" KSDK into Petitioners' residence. Additionally, the KSDK news crew, unlike the private individuals in those cases, neither participated in the search nor engaged in an independent search of Petitioners' residence for items unrelated to those described in the search warrant. And, perhaps most important, unlike the corporate security officers in *Bills* and *Buonocore*, KSDK was not present in

Petitioners' residence searching for its corporate property in furtherance of its own criminal investigative purposes, but rather was simply observing the City Police Officers' search for items specifically enumerated in the warrant in furtherance of KSDK's own newsgathering purposes.

Contrary to Petitioners' assertions herein, *Bills* and *Buonocore* do not turn on whether the government wrongfully allowed thirdpersons to observe an otherwise reasonable search,[10] but rather on whether the government had evaded the constraints of the Fourth Amendment, or invited its circumvention, by conducting or encouraging judicially unauthorized suspicionless and unparticularized searches through or by third persons in furtherance of either their own or a private criminal investigation. *See Parker*, 905 F.Supp. at 642-43 ("The facts in this case are ... easily distinguished from cases in which ... a corporate security guard was invited to accompany the police in executing a search warrant in a home in furtherance of the corporation's own investigation of the ... alleged thefts ....") (*citing Bills II*). Accordingly, there is no fully developed appellate conflict that avoids the *Mendoza* rule and justifies granting *certiorari* in this case.

Nor does the Court of Appeals' determination that "we [do not] think it self-evident that the police offend fourth-amendment principles when they allow members of the news media to enter someone's house during the execution of a search warrant," 93 F.3d at 447, squarely conflict, as Petitioners contend, with the Fourth Amendment jurisprudence of this Court. This Court has never suggested, let alone squarely held, that such police conduct violates the Fourth Amendment. To the contrary, this Court implicitly has rejected Petitioners attempt to constitutionalize via the Fourth Amendment what at most is a state law tort claim for invasion of privacy against Respondent police officers and KSDK. *Katz v. United States*, 389 U.S. 347, 350 and n. 6 (1967) ("the protection of a person's general right to privacy — his right to be let alone by other people — is ... left largely to the law

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[10] Indeed, such passive observation has been held not to offend the Fourth Amendment. *United States v. McKeever*, 906 F.2d 129, 132 (5th Cir. 1990), *cert. denied*, 498 U.S. 1070 (1991) (Fourth Amendment not violated where magistrate judge observed but did not participate in the search).

of the individual States."); *Soldal v. Cook County*, 506 U.S. 56 (1992) ("the Fourth Amendment can neither be translated into a provision dealing with constitutionally protected areas nor into a general constitutional right to privacy") (*citing Katz*, 389 U.S. at 350). *Cf. Collins v. Harker Heights*, ___ U.S. ___, 112 S.Ct 1061 (1992) ("Because the Due Process Clause does not purport to supplant traditional tort law in laying down rules of conduct to regulate liabilities for injuries that attend living together in society we have previously rejected claims that the Due Process Clause should be interpreted to impose federal duties that are analogous to those traditionally imposed by state tort law.") (quotations and citations omitted).

The issue presented herein has never been squarely addressed by this Court and has been addressed by at most only two courts of appeals. If ultimately reviewable by this Court at all, it first should be allowed to percolate in the federal courts of appeals until such time, if ever, as it is jurisprudentially mature and ripe for this Court's review. For this reason alone, Petitioners' Petition should be denied. *See Mendoza*, 464 U.S. at 160.

II. DID THE COURT OF APPEALS CORRECTLY DETERMINE THAT RESPONDENT POLICE OFFICERS WERE ENTITLED TO QUALIFIED IMMUNITY WITHOUT FIRST DETERMINING WHETHER THE CONSTITUTIONAL RIGHT PETITIONERS SOUGHT TO VINDICATE IN FACT EXISTS, WHEN DECIDING THIS CASE ON THAT BASIS AVOIDED NEEDLESSLY REACHING AND RESOLVING A COMPLEX CONSTITUTIONAL QUESTION?

Petitioners argue that the Court of Appeals erred when it decided that the police officers were entitled to qualified immunity without first determining whether the constitutional right claimed by Petitioners in fact existed.

It is axiomatic, however, that courts should avoid reaching constitutional questions when a case can be decided on non-constitutional grounds. *U.S. v. National Treasury Employers Union*, ____ U.S. ____, 115 S.Ct. 1003, 1019 (1995) (Court has "policy of avoiding unnecessary adjudication of constitutional issues.") (*citing Ashwander v. TVA*, 297 U.S. 288, 346-47 (1936); *Taylor v. Peabody Coal Co.*, 892

F.2d 503, 508 (7th Cir. 1990) ("In general, courts will not consider constitutional arguments where a case may be disposed of on alternate, non-constitutional grounds.").

Nothing in *Siegert v. Gilley*, 500 U.S. 226 (1991) alters this prudential rule of decision. Indeed, contrary to Petitioners' suggestion, *Siegert* does not state that courts of appeals *must always* as an initial inquiry address whether a constitutional violation has been alleged by the plaintiff." *Acierno v. Cloutier*, 40 F.3d 597, 606 n.7 (3d Cir. 1994). This Court's decision in *Siegert*, when read as a whole, permits appellate courts to decide cases "on the ground that appear[s] to offer the most direct and appropriate resolution." *Siegert*, 500 U.S. at 235 (Kennedy, J., concurring in the judgment).

The Court of Appeals properly followed this decisional rule when it avoided resolving the complex underlying constitutional issue of whether the law enforcement officers violated the Fourth Amendment and instead decided the case on a narrower, non-constitutional basis; *i.e.*, that the police officers were entitled to qualified immunity because the constitutional principle Petitioners sought to vindicate, regardless of its ultimate viability, was not well-established at the time the police officers allegedly violated it. 93 F.3d at 447. Because the Eighth Circuit's decision properly proceeds from and conforms to this prudential rule, a review of that decision by this Court is unwarranted.

III. DID THE COURT OF APPEALS CORRECTLY DETERMINE THAT KSDK WAS NOT A STATE ACTOR FOR PURPOSES OF 42 U.S.C. § 1983, WHEN, ACTING ON ITS OWN INITIATIVE AND SOLELY FOR NEWS-GATHERING PURPOSES, KSDK'S NEWS CREW ENTERED A PRIVATE RESIDENCE TO OBSERVE AND FILM A SEARCH BY LOCAL LAW ENFORCEMENT OFFICIALS THEREIN, WITHOUT PARTICIPATING IN, AIDING OR ORCHESTRATING THE SEARCH, AND WITHOUT PRIOR AUTHORIZATION, DIRECT ASSISTANCE OR EXPRESS PERMISSION FROM THE LAW ENFORCEMENT OFFICIALS CONDUCTING THE SEARCH?

Petitioners' petition for writ of *certiorari* as to the state action issue should be denied for three independent reasons. First, there is no conflict among the federal courts of appeals, or between the decision

below and the decisions of this Court, to justify granting the instant Petition. Second, the decision below turns on application of the well-established § 1983 state action test enunciated in *Lugar v. Edmondson Oil* to the undisputed facts of this case. As such, the decision below provides little precedential value regarding the state action issue. Third, the decision below was correct, in that it is amply supported by this Court's jurisprudence and the uncontroverted record evidence.

A. There Is No Conflict Among the Circuit Courts of Appeals, Or Between The Decision Below and Those of This Court, to Support Petitioners' Petition.

The Court of Appeals in the decision below is the only federal appellate court to confront squarely the issue of whether a private news organization is a state actor for purposes of 42 U.S.C. § 1983 when, acting of its own volition, it is present during the execution of a search warrant by local law enforcement officials merely to observe and gather news about that police activity. For this reason alone, the Petition should be denied. *See United States v. Lorenzetti*, 467 U.S. 167, 173 (1984) (grant of *certiorari* warranted where courts of appeals decisions "squarely conflicted."); *Mendoza, supra* (several courts of appeals should explore a difficult issue before *certiorari* is granted).

Moreover, the Court of Appeals' decision below is entirely consistent with those of other courts that have explored similar issues and held or suggested that the private person who either participated in or observed the search was not a state actor subject to the constraints of the Fourth Amendment. *See, e.g., Bills v. Aseltine*, 958 F.2d 697, 703 (6th Cir. 1992) ("*Bills I*") (private corporate security officer "obviously had no warrant of his own, and his intrusion was separate and distinct from the police entry because he entered the premises for purposes other than the execution of the search warrant."); *see also, United States v. Sanchez*, 509 F.2d 886, 889 (6th Cir. 1975) (warrantless entry into and search of home by federal ATF agent, while accompanying state police officers who were searching the home pursuant to a search warrant for a different purpose, is a "simultaneous but distinct" intrusion); *Bills II*, 52 F.3d at 606 (reaffirming that the

private security officer "is not a state actor and thus cannot violate the Fourth Amendment."); *Mullins v. Bookman*, 23 Med.L.Rptr. 2374 (D. Ga. 1995) (holding no § 1983 state action under joint participation test when prison officials allowed media defendants to enter prison and escorted them around the facility but "were not involved in the *production*, editing or content of the broadcast at issue") (emphasis supplied);[11] *Jones v. Taibbi*, 508 F.Supp. 1069, 1072-74, n. 6 and n. 10 (D. Mass.), *cert. denied*, 454 U.S. 1085 (1981) (noting generally that "attempts to charge the media with state action have generally met with a cool reception in the courts" and holding that television news reporter not a state actor where he did not control police decision to arrest the plaintiff and police were not involved in his decision to cover or telecast the story); *Prahl v. Brosamle*, 98 Wis.2d 130, 295 N.W.2d 768 (Ct. App. 1980) (reporter, who learned of search via police scanner, and given permission by police to film the search of plaintiff's home, was not a state actor because he was acting exclusively for his private employer, filming on his own initiative and playing no official role in raid). *Cf.*, *Berger v. CNN Inc.*, 24 Med.L.Rptr. 1757, 1759 (D. Mont. 1996) ("acting under color of law" requirement for *Bivens* action not fulfilled where members of news media are present at search in furtherance of their own newsgathering purposes).

Nor is there a direct and apparent conflict between the decisions below and those of this Court. No prior decision of this Court has squarely confronted whether and under what circumstances the private news media can be a state actor for purposes of § 1983, let alone found state action on even remotely similar facts. Nor can Petitioners point to any state action decision of this Court that, on its precise holding, is squarely at odds with the decisions below. To the contrary, and as will be demonstrated below, this Court's decisions amply support that of the Court of Appeals.

The Petition fails for yet another reason. In determining that, on the undisputed evidence, Petitioners could not establish that KSDK was a state actor under this Court's decision in *Lugar*, the decisions below

[11] This unpublished decision together with all other unpublished Media Law Reporter decisions cited herein properly were relied on below pursuant to Local Rule 28A(k) of the Eighth Circuit Court of Appeals, in that they have persuasive value on material issues for which there is little or no precedential case law.

each applied findings of undisputed fact to the well-established precedent of this Court. Because the Petition seeks to challenge these factbound applications of previously settled law, *certiorari* is unwarranted. In reality, Petitioners quarrel more with the lower courts' findings of undisputed fact than with the conclusions of law drawn therefrom. That Petitioners primarily take issue with the lower courts' findings of fact is evidenced by those instances in their Petition, as noted above in KSDK's Statement of the Case, where Petitioners' alleged and unsupported facts are directly at odds with the factual findings of the courts below. In such circumstances, review by this Court is unwarranted, particularly when, as here, the findings of fact made by the district court received the concurrence of the Court of Appeals.[12] *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a *certiorari* to review evidence and discuss specific facts."); *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949) ("a court of law, such as this Court is, rather than a court of correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error.").

B. The District Court Properly Granted Summary Judgment in KSDK's Favor as to Petitioners' Claims under 42 U.S.C. § 1983, And the Court of Appeals Correctly Affirmed That Ruling, Because KSDK's Conduct at Issue in this Case Does Not Constitute State Action under *Lugar v. Edmondson Oil Co.*

The Court of Appeals correctly affirmed the District Court's grant of summary judgment in favor of KSDK and against Petitioners on their § 1983 claim, on the grounds that KSDK was not acting under color of law when it entered Petitioners' residence and filmed the execution of a valid search warrant therein by the SLPD. Petitioners now wish this Court to review and overturn these rulings. The decisions below, however, are correct and amply supported by this Court's jurisprudence and the uncontroverted facts as determined by

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[12] The Court of Appeals adopted and concurred in the District Court's findings of undisputed fact. *See Parker*, 93 F.3d at 448.

the District Court and adopted by the Court of Appeals. Accordingly, these decisions should not be reviewed, let alone overturned, by this Court.

It is axiomatic that to pursue a claim under 42 U.S.C. §1983 against KSDK, Petitioners necessarily must show that KSDK acted under "color of state law." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 924 (1982). Section 1983's statutory requirement of action "under color of state law," has been construed as identical to the "state action" requirement of the Fourteenth Amendment. *Lugar*, 457 U.S. at 928-29. There are two components to the § 1983 "state action" requirement: (1) the deprivation must be shown to have been caused by the exercise of some right or privilege created by the state, or by a person for whom the state is responsible; and (2), the party charged with the deprivation must be someone who can fairly be said to be a state actor." *Lugar*, 457 U.S. at 497.

This Court counsels that a private person such as KSDK[13] should be held to be a state actor only reluctantly:

> Careful adherence to the "state action" requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power. It also avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed. A major consequence is to require the courts to respect the limits of their own power as directed against state governments and private interests. Whether this is a good or bad policy, it is a fundamental fact of our political order.

Lugar, 457 U.S. at 936-37.

This reluctance is even more pronounced when the plaintiff attempts to prove state action by linking acts of state officials to "private conduct that itself is the subject of constitutional protection." *Phelps v. Wichita Eagle-Beacon*, 886 F.2d 1262, 1271 (10th Cir. 1989). *Cf. Zerilli v. Evening News Ass'n.*, 628 F.2d 217 (D.C. Cir. 1980) (affirming dismissal of Fourth Amendment based *Bivens* action against private newspaper in view of "special factors counseling hesitation" including concern that imposing liability on a newspaper "for uncov-

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[13] It is undisputed that KSDK is a private entity.

ering and publishing information that it deem[ed] newsworthy" would undermine "the values served by a free and vigilant press"). This is precisely the case here, in that KSDK's newsgathering and its editorial decision to follow the SLPD into Plaintiffs' residence to film and broadcast the search are acts implicating the First Amendment.

Because the state action inquiry is so fact specific, the holdings below provide only narrow precedential value. For this reason alone, this Court should deny the instant petition. Moreover, measuring the undisputed facts as determined below against this stringent state action standard compels the conclusion that neither of *Lugar's* state action components is satisfied in this case.

1. KSDK Was Not Exercising a Right or Privilege Created by the State When It Entered the Parker Residence and Filmed the Search.

The courts below properly held that Petitioners did not satisfy the first prong of the *Lugar* test, which required them to show that the alleged deprivation was caused by the exercise of some right or privilege created by the state, because, "at most, KSDK's acts were committed parallel to and contemporaneous with the police officers' exercise of privileges under state law in the execution of a lawfully obtained search warrant. *Parker*, 905 F.Supp. at 642; 93 F.3d at 448.

Nonetheless, Petitioners opine that the District Court and the Court of Appeals misapplied the first prong of the *Lugar* test. While their theory in this regard is not altogether clear, and mistakenly melds the first and second prongs of the *Lugar* test, Petitioners appear to be contending that KSDK somehow vicariously exercised the state-created privilege of the SLPD to enter and search the home pursuant to the search warrant.[14] The gist of this argument seems to be based on the erroneous premise that the basis for KSDK's entry is the same as the basis for the SLPD's entry, *i.e.*, the search warrant. (*See* Petition, p. 8.) This argument is fatally flawed for two reasons.

First, this argument has been either expressly or implicitly rejected by courts that have confronted similar situations when private persons

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[14] Petitioners do not claim that the first prong is satisfied because KSDK is an entity for whom the state is responsible or that KSDK acted in accordance with a rule of conduct imposed by the state.

have accompanied law enforcement agents during a search of a private residence. For example, the Sixth Circuit Court of Appeals in *Bills I* stated that the private security officer who accompanied police "obviously had no warrant of his own, and his intrusion was separate and distinct from the police entry because he entered the premises for purposes other than the execution of the search warrant." 958 F.2d at 703. Based on these facts, the Sixth Circuit rejected in *dictum* the notion that the security guard could be held liable for violating the Fourth Amendment in such circumstances:

> It is also important to bear in mind that the rights afforded by the Fourth and Fourteenth Amendments protect citizens only against governmental action. As the Supreme Court stated in *Burdeau v. McDowell*, 256 U.S. 465, 475, 41 S.Ct. 574, 576, 65 L.Ed. 1048 (1921), the Fourth Amendment 'was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies ....' Thus, [the security guard's] inspection tour and photographing of items in plaintiff's home, by itself, while perhaps constituting a trespass, does not offend the Fourth Amendment. *Id.* at 703-04.

See also, *Bills II*, 52 F.3d at 606 (reaffirming that the private security officer "is not a state actor and thus cannot violate the Fourth Amendment."); *Sanchez*, 509 F.2d at 889 (entry authorized by warrant and warrantless entry are simultaneous but separate intrusions).

Similar to the corporate security officer in *Bills I*, KSDK was not named in the search warrant authorizing the police to be in Petitioners' house, had no search warrant of its own and entered the premises for purposes other than the execution of the search warrant. It is undisputed, moreover, that KSDK did not seek permission from the SLPD to enter the residence and the SLPD did not invite KSDK to enter the residence. Rather, the KSDK news crew followed their journalistic instincts and entered the Parker residence to gather news about the MRU's weapons suppression program. Thus, KSDK did not enter the residence pursuant to the search warrant and its entry into the Parker residence was separate and distinct from the SLPD entry. From this it necessarily follows that KSDK's entry into the Parker residence during and videotaping of the search, by itself, is similarly not state

action subject to the constraints of the Fourth and Fourteenth Amendments and § 1983.

The second flaw in Petitioners' argument is that it threatens to obliterate the distinction between state and private conduct. With this state action theory, Petitioners apparently contend that the media stand in the shoes of law enforcement and thus vicariously exercise executive powers solely by virtue of their simultaneous coverage of law enforcement activity. To accept such an argument would be to convert all simultaneous media coverage of law enforcement activity into state action. Creating such ill-conceived precedent would place the media at risk of sharing liability for any unlawful law enforcement activity they have the misfortune to cover and consequently discourage first-hand coverage of law enforcement and other governmental activity. Such a nonsensical result not only would thwart the media's performance of its constitutional role as the watchdog of governmental conduct, but also runs contrary to the Court's admonition in *Lugar* against too facile an extension of § 1983 liability to private parties.

Despite their assertions to the contrary, Petitioners' argument that they satisfied the first prong is precluded by this Court's holding in *Lugar*. In *Lugar*, the Court held that allegations of private misuse of a state statute or legal procedures do not satisfy the first prong of the state action analysis. Here Petitioners have argued that the Respondent police officers exceeded the scope of the warrant and violated the Fourth Amendment by permitting KSDK to be present during the search without the warrant authorizing KSDK to be there. Because it alleges that the Respondent police officers and KSDK misused the search warrant that did not authorize KSDK's presence in their residence, Petitioners' § 1983 claim, like the first claim at issue in *Lugar*, fails the first prong of the state action analysis.

Ultimately, Petitioners simply cannot point to any right or privilege created by the state that KSDK exercised to enter their residence and film the search to support their § 1983 claims against KSDK. Therefore, Petitioners cannot satisfy the first prong of *Lugar*. For this reason alone, the District Court and Court of Appeals correctly held that Plaintiffs' § 1983 claim against KSDK fails as a matter of law.

2. KSDK Cannot Fairly Be Said To Be a State Actor.

Although the District Court held that Petitioners had not satisfied the second prong of *Lugar*, which requires that a private party must fairly be said to be a state actor before subjecting it to the strictures § 1983, the Court of Appeals, which based its decision solely on *Lugar's* first prong, never reviewed that particular issue. Because the Court of Appeals did not address the second prong of the *Lugar* test, review of that prong would be premature and unnecesary. *Mendoza*, 464 U.S. at 160.

In any event, the District Court properly held that Petitioners did not satisfy *Lugar's* second prong. In *Lugar*, the Court held that the second prong was satisfied under the joint participation test where, on the *ex parte* application of one party to a private dispute, a writ of attachment is issued by a state court clerk and executed by a local sheriff. The Court limited this holding to cases of prejudgment attachment. *See* 457 U.S. at 939 ("the Court has articulated a number of different factors or tests in different contexts; e.g., ... in the case of prejudgment attachments, a 'joint action' test"; consequently, [t]he holding today ... is limited to the particular context of prejudgment attachment."). Accordingly, in situations like here that do not involve prejudgment attachment, *Lugar* does not particularly apply.

Petitioners hinge their contention that KSDK was a state actor on three theories: 1) joint participation; 2) symbiotic relationship; and 3) nexus. Each of these theories is unavailing and finds no support in the undisputed facts of this case.[15]

a. The Undisputed Facts Do Not Support a Finding of State Action Under the Joint Participation Test.

Petitioners contend that KSDK's conduct satisfies the "joint participation" test. The focus of this test is whether the private party acted as a "willful participant in joint action with the state or its agents." *Parker*, 905 F.Supp. at 642 (*citing United States v. Price*, 383 U.S. 787,

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[15] This Court's recent jurisprudence indicates that the joint participation, symbiotic relationship and nexus theories are factors to be considered in determining whether a private party can fairly be said to be a state actor under *Lugar*'s second prong. *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 620 (1991).

794 (1966)). *Accord Mershon v. Beasley*, 994 F.2d 449 (8th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1055 (1994). Applying this "joint action" test, the Eighth Circuit has held, consistent with other courts of appeals, that, to survive a motion for summary judgment, a plaintiff seeking to hold a private party liable under § 1983 must adduce evidence from which reasonable jurors could conclude that there was a mutual understanding, or a meeting of the minds, between the private party and the state actor as to an unconstitutional goal or purpose. *Mershon*, 994 F.2d at 451; *Murray v. Wal-Mart, Inc.*, 874 F.2d 555, 558 (8th Cir. 1989).

Petitioners nonetheless maintain that they need not prove a conspiracy between the state and private actors to satisfy the "joint participation" test "because the Court in *Lugar* did not require that a private party's action rise to the level of a conspiracy to constitute state action." *See* Petition at 16. While this may be true under *Lugar* in the context of prejudgment attachment, the same cannot be said of cases, such as this, that fall outside that particular context. *Lugar*, 457 U.S. at 940 n. 21 ("The holding today ... is limited to the particular context of prejudgment attachment."). In cases such as this that do not involve prejudgment attachment, the precise contours of the joint participation test are delineated by *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970), as subsequently refined by the decisions of this Court. In *Adickes*, the Court "held that the private party's joint participation with a state official *in a conspiracy* to discriminate would constitute ... action 'under color' of law for purposes of [§ 1983]." *Lugar*, 457 U.S. at 931 (emphasis supplied) (*citing*, *Adickes*, 398 U.S. at 152; *see also United States v. Price*, 383 U.S. 787, 795 (1966) (under color of law requirement satisfied where it was alleged that private parties acted in "willful concert with state officers."). Accordingly, the Court of Appeals' articulation below of the joint participation test as requiring "a mutual understanding or meeting of the minds" is wholly consistent with the decisions of this Court.

This undisputed evidence precludes a finding that KSDK and the SLPD possessed a mutual understanding that KSDK would enter Petitioners' residence to film the search. Petitioners' joint participation argument hinges entirely on their assertion that KSDK and Respondents Boyer, Dell and Risk "jointly agreed for KSDK's news

crew to be present and to enter Petitioners' home under the guise of the search warrant." *See* Petition at 17. The undisputed facts as determined by the District Court, however, refute this assertion. Indeed, the District Court below expressly found that there was no meeting of the minds between KSDK and the SLPD. 905 F.Supp. at 642 (no "affirmative agreement between KSDK and the police concerning the particular conduct of KSDK which Plaintiffs now challenge"). KSDK did not seek or obtain permission from the SLPD to enter Petitioners' residence. Rather, the KSDK news crew made a unilateral decision to enter the Parker residence for the sole purpose of publishing a story about such searches on KSDK's newscast. The SLPD, on the other hand, entered the Parker residence for the sole purpose of executing a valid search warrant. The District Court thus correctly concluded that Petitioners did not satisfy the joint action test because the SLPD and the KSDK news crew entered the Parker home for disparate purposes and while there performed the entirely and immutably separate functions of press and police, respectively. 905 F.Supp. at 642-43. *See also Polk County v. Dodson*, 454 U.S. 312 (1981) (holding that despite employment by government, a public defender, in serving the interests of a private criminal defendant is not a state actor); *Prahl v. Bosamle*, 295 N.W.2d at 774.

The undisputed facts also reveal that the SLPD did not instruct KSDK to film the search, where to go, what to do, who to film or whether even to broadcast a story about the search. *See Mullins v. Bookman*, 23 Med.L.Rptr. 2374 (D. Ga. 1995) (holding no § 1983 state action under joint participation test when prison officials allowed media defendants to enter prison and escorted them around the facility but "were not involved in the *production*, editing or content of the broadcast at issue") (emphasis supplied); *Price v. Baker*, 693 F. 2d 952, 953-54 (10th Cir. 1982) (private actor not liable under § 1983 where police did not direct her actions but instead plaintiff acted independently and of her own volition); *Jones v. Taibbi*, 508 F.Supp. at 1072-73, n. 10 (television news reporter not a state actor where he did not control police decision to arrest the plaintiff and police were not involved in his decision to cover or telecast the story).

Similarly, the SLPD obtained, reached the decision to execute, and executed the search warrant at issue in this case without any input

whatsoever from KSDK. Indeed, the undisputed record evidence reveals, contrary to Petitioners' unsupported assertion, that KSDK did not even know a search was to be executed at a private residence before its news crew arrived there. At no time prior to KSDK's entry of Petitioners' residence did the SLPD and KSDK plan or anticipate that KSDK would enter or film inside residences. Moreover, KSDK neither orchestrated nor assisted the actions of the SLPD. Rather, the KSDK news crew merely made the unilateral decision to follow and record the SLPD as police searched the premises. From these undisputed facts it necessarily follows that KSDK and the SLPD did not act according to a preconceived plan or conspiracy. Thus, KSDK was not engaged in joint action with the SLPD.

Petitioners' attempt to establish a preconceived plan and conspiracy for the KSDK's news crew to be present in and to enter their residence based on the mere fact that the KSDK news crew happened to be riding along with the police on the night of the search. This is insufficient as a matter of law because it is based on mere conjecture and speculation. The fact that the SLPD agreed to allow the KSDK news crew to ride along that evening does not evince a meeting of the minds between the SLPD and KSDK as to what KSDK would see or do, or report or film, during the ride-along. This is precisely the type of tenuous connection which the Eighth Circuit previously has rejected as a basis for § 1983 liability against a private entity. *See, e.g., Mershon v. Beasley*, 994 F.2d at 452 (inference of a mutual understanding cannot be the result of mere conjecture and speculation).

Petitioners also claim that KSDK's conduct constitutes state action because its newsgathering somehow was facilitated by the SLPD confining the occupants of the Parker residence to one room during the search. However, Petitioners cannot point to a single undisputed fact that supports their conclusion that the SLPD confined the occupants to one room for any reason other than as a routine measure to secure the premises during the search. There is absolutely no record evidence that the SLPD restricted the residents in an effort to facilitate KSDK's newsgathering activities. Nor is there any evidence that this action by the SLPD actually did facilitate KSDK's newsgathering efforts. In any event, if state action can be based on such a routine law enforcement practice which, at most, unintentionally and only incidentally would

serve to facilitate media coverage of police activity, the news media would find themselves inundated with constitutional litigation as a result of gathering news about law enforcement operations.

There are absolutely no facts in the undisputed record evidence of this case from which a reasonable juror can conclude that there was a mutual understanding, or a meeting of the minds, between KSDK and the SLPD. Accordingly, Petitioners cannot establish state action under the joint participation test.[16]

b. The Undisputed Facts Do Not Support a Finding of State Action Under Either the Symbiotic Relationship Theory Or the Nexus Theory.

The undisputed facts likewise do not support Petitioners' symbiotic relationship and nexus theories of state action. Under the symbiotic relationship theory, state action is present if the state "has so far insinuated itself into a position of interdependence" with a private party that "it must be recognized as a joint participant in the challenged activity." *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725 (1961). Here, not one undisputed fact even remotely suggests that the SLPD and KSDK share such a relationship.

Nevertheless, Petitioners contend that the facts of this case fall within the ambit of *Burton*, theorizing that the SLPD and KSDK mutually benefitted from KSDK's broadcast about the weapons suppression program. Specifically, Petitioners would have this Court predicate a finding of state action solely on the unsupported, conclusory assertions that the SLPD received somewhat favorable media coverage and KSDK obtained a good story for its news program and

[16] In an effort to avoid their heavy burden on the state action requirement, Petitioners cite *Lucas v. Wisconsin Electric Power Co.*, 466 F.2d 638, 655 (7th Cir. en banc 1972), *cert. denied*, 409 U.S. 1114 (1973). That decision, however, is unavailing for two related reasons. First, it predates *Lugar* and thus was not applying the state action analysis articulated there. Second, to the extent that Seventh Circuit decision can be read as standing for the proposition, divorced from its precise holding, that state action is established where the private party "derives *some* 'aid, comfort, or incentive,' either real or apparent, from the state," *id.* at 655 (*citing, Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970) (Brennan J., concurring) (emphasis supplied), it is implicitly overruled by *Lugar*, which requires "*significant*" state aid before private action becomes that of the state. 457 U.S. at 937.

allegedly realized a corporate profit as a result. Even if Petitioners had produced evidence of such a benefit, this simply is not the type of ongoing mutual benefit found to exist in *Burton* in which there existed an overwhelming degree of financial integration and interdependence not present here. 365 U.S. at 51.

The undisputed facts likewise do not support Petitioners' theory that KSDK was a state actor under the "nexus" theory. Under this theory, private conduct can constitute state action when the state has coerced or has so significantly encouraged the decision to engage in such conduct that the conduct must "in law be deemed to be that of the state." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). In this case, no undisputed facts support a finding that the SLPD coerced or so significantly encouraged KSDK's decision to enter the Parker residence and film the search so as to transform KSDK's conduct into state action. Indeed, the District Court found that KSDK's act of entering Petitioners' residence and filming the search proceeded from the KSDK news crew's independent exercise of its journalistic judgment and decision to cover and report on a newsworthy event.

Finally, Petitioners seem to imply that KSDK should be found to be a state actor because the SLPD acquiesced to KSDK's presence at Petitioners' residence during the search. Such a theory is unavailing. It is well-established that the state's "mere acquiescence in a private action does not convert that action into that of the State." *See, e.g., Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 164 (1978); *Rendell-Baker v. Kohn*, 457 U.S. 830, 1004-05 (1982).[17]

[17] Petitioners' suggestion that KSDK's mere participation in a ride-along with the City Police Officers is alone sufficient to support a finding of state action not only fails to satisfy this Court's state action standards, but also offends the First Amendment. If accepted, this state action theory, by which the Parkers attempt to subject KSDK's newsgathering to § 1983 liability, is impermissibly chilling and overbroad because it sweeps the lawful newsgathering activity of participating in ride-alongs within the ambit of potentially unconstitutional conduct. In so doing, it restricts the media's right to gather news and deprives the public of information about law enforcement operations. Without such information, the public's ability to exercise its First Amendment right to free and informed public discourse about issues of public concern would be significantly curtailed. At a very minimum, the impact of holding that the media is subject to the constraints of the Fourth Amendment when it simultaneously

(Footnote 18 continued on next page)

In the final analysis, none of Petitioners' state action theories — joint participation, symbiotic relationship or nexus — finds any support in the undisputed facts as determined below. Because KSDK cannot fairly be said to be a state actor, Petitioners cannot satisfy the second prong of the *Lugar* test. Accordingly, Petitioners' § 1983 claim is precluded as a matter of law and the decisions below granting summary judgment in favor of KSDK were proper.

Moreover, even if § 1983 and the Fourth Amendment could be stretched to extend to such situations, imposing liability on KSDK based on the facts herein would be erroneous as a matter of law for two additional and alternative reasons. First, assuming *arguendo* that the actions of the KSDK news crew had been found to be state action, § 1983 liability still could not be imposed on KSDK because the record evidence establishes conclusively that the KSDK news crew at all times was acting in good faith and did not act with a "subjective appreciation that its acts" would deprive Petitioners of the constitutional right to be free from unreasonable searches. *See, e.g., Jordan v. Fox Rothschild O'Brien & Frankel*, 20 F.3d 1250, 1276-77 (3rd Cir. 1994); *Wyatt v. Cole*, 994 F.2d 1113, 1120 (5th Cir.), *cert. denied*, 510 U.S. 977 (1993); *Vector Research, Inc. v. Howard & Howard Attorneys P.C.*, 76 F.3d 692 (6th Cir. 1996) (private defendants in a § 1983 action are entitled to an affirmative defense of good faith). KSDK's good faith acts as a complete bar to Petitioners' claims herein.

Finally, Petitioners' state action theories against KSDK necessarily fail because they are nothing more than an attempt to transmute what are, if anything, state tort claims to constitutional dimension. Such attempt is unavailing because KSDK's routine newsgathering activity at issue below was authorized under Missouri state law pursuant to the

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(Footnote 17 continued)

observes a search by law enforcement officials in a private residence should be explored by the lower courts before this Court reviews that issue. *Cf. Allen v. Combined Communications*, 7 Med.L.Rptr. 2417, 2418-2420 (D. Colo. 1981)(state's interest in undisturbed possession of private property as expressed in state trespass law must be balanced against media's First Amendment right to gather news).

common law doctrine of implied consent.[18] As such, KSDK's allegedly unconstitutional conduct was non-tortious and absolutely privileged under the First Amendment to the United States Constitution. *Florida Star v. B.J.F.*, 491 U.S. 524, 539 (1989) (First Amendment insulates non-tortious newsgathering from liability).

CONCLUSION

For the foregoing reasons, authorities and equities, Respondent Multimedia KSDK, Inc. respectfully requests that the Court deny the Petition of Sandra C. Parker and Dana M. Parker seeking a writ of *certiorari* granting review of the judgment below of the United States Court of Appeals for the Eighth Circuit in this cause.

Respectfully submitted,

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[18] That the District Court dismissed Petitioners' pendent state law claims for invasion of privacy without either addressing the merits of those claims or considering KSDK's defenses thereto, raises the troubling possibility that, should this Court review Petitioners' federal claim and subject KSDK to § 1983 liability, Respondents could be found to have violated the Fourth Amendment and § 1983 even though KSDK may have been authorized to be present in the Parker residence under state law pursuant to a theory of implied consent. *See Boling Concrete Constr. Co. v. Townsend*, 686 S.W.2d 842, 843 (Mo. Ct. App. 1985) ("[o]ne who silently watches another enter upon the former's land and then willingly engages the latter in conversation while standing upon the premises may not later be heard to complain of trespass").